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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1435

ZELDA DANNA PASCHALL, LOUISE GREEN HOYT, JOHN N. PASCHALL, JR., JAN PASCHAL HARDEN, and FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA,
Petitioners,

VERSUS

CHRISTIE-STEWART, INC. and
R. H. VAUGHN and R. W. GARRETT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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CHRISTIE-STEWART, INC. and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma in the case of Christie-Stewart, Inc. vs. Walter B. Paschall, Jr., et al., No. 43907, decided on November 5, 1974, rehearing being denied on January 13, 1976. That opinion was upon remand from the Supreme Court of the United States, No. 72-922, Mary Louise Green Paschall, et al. vs. Christie-Stewart, Inc., et al., decided on November 19, 1973 and reported in 414 U.S. 100, 38 L.Ed.2d 298, 94 S.Ct. 313.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma has not as yet been published (rehearing was denied on January 13, 1976). A copy of the opinion appears in the Appendix hereto. For convenient reference, copies of the original trial court Judgment and the opinions of the Oklahoma Court of Appeals, the Oklahoma Supreme Court and the Supreme Court of the United States are included in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3). The judgment of the Supreme Court of Oklahoma was entered on November 5, 1974. A timely petition for rehearing was denied January 13, 1976.

QUESTIONS PRESENTED

1. Whether Petitioners preserved the right to challenge the Trial Court's determination that the Oklahoma statute of limitations is a bar to their mineral rights claim, protected by constitutional notice requirements.

2. Whether, under Oklahoma law, the statute of limitations independently bars Petitioners' claim, irrespective of the constitutional adequacy of the tax-sale notice provisions of the state statutes.

3. Whether the notice requirements of the tax-sale statutes of the State of Oklahoma in effect at the time of the purported taking of the mineral rights of Petitioners (68 Okla. Stat. 1951, §381 *et seq.*) were repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

4. Whether adequate notice of an Original Tax Sale and a Tax Resale was given Petitioners or their predecessors as owners of previously severed mineral rights under lands in the State of Oklahoma, consistent with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of Amendment XIV of the Constitution of the United States provides, in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1.

PETITIONERS PROPERLY PRESERVED THE RIGHT TO CHALLENGE THE TRIAL COURT'S DETERMINATION THAT THE STATE'S STATUTE OF LIMITATIONS IS A BAR TO PETITIONERS' MINERAL RIGHTS CLAIM.

This case has previously been before the Supreme Court of the United States as Case No. 72-922, remanded to the Supreme Court of Oklahoma on November 19, 1973, to consider whether the appellants (Petitioners here) preserved the right to challenge the Trial Court's determination that the Oklahoma statute of limitations (12 Okla. Stat. 1961 §93(3) and (6)) is a bar to their mineral rights claim, and if so, whether, under state law, the statute of limitations independently bars appellants' (Petitioners

here) claim, irrespective of the constitutional adequacy of the tax-sale notice provisions of the state statutes. The Oklahoma Supreme Court ruled, upon remand, that Petitioners did not effectively preserve their right to challenge the Trial Court's determination that the Oklahoma statute of limitations is a bar to their mineral rights claim and therefore refused to consider the second question.

Petitioners now seek a review of the decision by the Oklahoma Supreme Court on that issue because the adverse decision thereof is not only erroneous, but also is an attempt mechanically to cut off the constitutional rights of Petitioners without an opportunity for this Court to review the more substantive issues of due process and equal protection of the laws. These substantive issues were argued in the Trial Court and at every level of appeal, including briefing and argument in the Supreme Court of the United States, but this has all been wiped out by a strained and patently erroneous determination that an argument against the applicability of the statute of limitations was not carried into the original appellate brief-in-chief in the state court. The effect of that determination by the Oklahoma Supreme Court is that state statutes which permit the taking of real property by tax sales without constitutionally adequate notice will go unchallenged, resulting in the unconstitutional taking of Petitioners' mineral rights.

That adequate challenge to the applicability of the statute of limitations was made by Petitioners is obvious in the record. In the Petition in Error filed December 2, 1969, in the Supreme Court of Oklahoma, four separate averments of error and prayers in regard thereto were set

forth in detail specifically challenging the bar of the statute of limitations:

> "4. The lower court erred in finding and adjudicating that Defendants in Error R. W. Garrett and R. H. Vaughn have been in the possession of the oil, gas and other mineral rights of these Plaintiffs in Error in and under the above described land, from and after the recording of the above mentioned Resale tax deed.
>
> "5. The lower court erred in adjudicating that the possession asserted by Defendants in Error R. W. Garrett and R. H. Vaughn with respect to the above described land as a matter of law bars and precludes these Plaintiffs in Error from seeking to assert the invalidity of such Resale tax deed.
>
> "WHEREFORE, Plaintiffs in Error pray that such judgments and orders may be reversed and set aside and that judgment may be rendered with regard to each of the issues stated above in favor of Plaintiffs in Error as follows:
>
> "(c) That Defendants in Error R. W. Garrett and R. H. Vaughn have never been in possession, either actual or constructive, of the oil and gas and other minerals underlying the above described land;
>
> "(d) That the possession asserted by Defendants in Error R. W. Garrett and R. H. Vaughn with respect to the above described land as a matter of law does not bar or preclude Plaintiffs in Error from asserting the invalidity of the Resale tax deed above mentioned, or any of their respective rights in and to the oil and gas and other minerals in and under such land."

The plain fact of an adequate statement of a challenge to the bar of the statute of limitations in the Petition in Error has been repeatedly admitted by Respondents in briefs below.

Likewise, the original brief-in-chief, dated April, 1970, carefully and specifically carried forward this challenge by statement of facts, argument, and citation of authority:

> "*Statement of Facts* . . . Mr. Vaughn testified that no other lease had been previously executed by the tax sale purchasers, that they had conducted no previous exploration for oil, gas, or other minerals on the land, and that no production had been established in the interim between the tax sales of 1953-1956 and the leasing to Christie-Stewart, Inc."

Then the following appears on page 5, arguing the legal effect of the facts of the case in relation to possession and citing authority that the statute of limitations is not a bar under such circumstances:

> "It is the testimony in this case that the tax sale purchasers at the Resale of 1956 filed their deed and *took possession of the surface of the land through a tenant, but they made no attempt to take possession of the minerals thereunder either by executing a lease or physically exploring for minerals under the land.* This was the status until Christie-Stewart, Inc., prevailed upon them to execute the oil and gas lease of 1963. Thereafter, Christie Stewart, Inc., also obtained an oil and gas lease from the Paschalis and Mr. Ross and this action was filed in 1965. *It cannot be argued therefore that any possession of the minerals was obtained by the tax title claimants prior to this case coming to issue, since only the surface owner's name was included in the Resale publication notice and only the surface was actually possessed thereafter by the tax sale claimants.*
>
> "We call the Court's attention to the case of *Walker v. Hoffman*, 405 P.2d 57 (Okla. 1965). The case involved the question of whether a severed mineral

> interest owner was deprived of his property by a certificate deed issued after an Original Sale. A Resale was not involved, but like the Resale procedure the statute concerning the issuance of the certificate deed (68 Okla. Stat. 1961, §451) required notice to the 'owners' of the land. The Supreme Court of Oklahoma held that the defendant, who owned only a severed mineral interest at the time of the tax sale, was an 'owner' as contemplated by the statute and entitled to notice. Having failed to give such owner notice, the procedure resulting in the certificate deed could not divest the mineral owner's title. *Possession of the surface for the period of limitations did not preclude the mineral owner from asserting his title. Thus, title was quieted in the defendant to the previous severed mineral interest.*" (Emphasis supplied.)

Note the specific reference to the "period of limitations" in the last quoted sentence, and the repeated references to the possessory status of the mineral rights, which is the sole basis for the applicability of the statute of limitations. The cited case deals primarily with the applicability of the statute of limitations in tax sales in Oklahoma. Much other authority is cited in that case, specifically holding that possession is a prerequisite for the applicability of the statute of limitations. The case specifically and primarily deals with the question of why the statute of limitations is not applicable where possession of the severed minerals is not taken.

Having challenged the applicability of the statute of limitations by averments in the Petition in Error and by factual statement, argument and citation of authority in the original brief-in-chief, Petitioners had fulfilled their obligations to bring forward the question of the applicabil-

ity of the statute of limitations. It then became incumbent upon Respondents to go forward with the argument if they seriously relied thereon. However, the answer brief of Respondents dated June, 1970, was silent on the issue of the statute of limitations, and consequently neither the opinion of the Court of Appeals of Oklahoma nor that of the Supreme Court of Oklahoma dealt with that issue. Petitioners submit that the question of the applicability of the statute of limitations was abandoned by the Respondents, not the Petitioners, and only the constitutional questions of failure of notice during the tax sales was before the Court of Appeals, the Supreme Court of Oklahoma, and the Supreme Court of the United States when the case previously reached this Court. As was stated by Mr. Justice Douglas in his dissenting opinion, concurred in by Mr. Justice Stewart, when this case was first heard here:

"It should first be noted that proper preservation of this issue in the state courts is a hurdle facing not the appellants but the appellees. The Oklahoma Court of Appeals quieted title in appellants and thus must necessarily have found not only that the tax sale was constitutionally infirm but that the appellants' claim was not time barred. The Oklahoma Supreme Court reversed that judgment and affirmed the judgment of the trial court after finding that '[*t*]*he* question for decision is whether the Oklahoma statutory procedure [complies] with due process of law.' *Christie-Stewart, Inc.* v. *Paschall*, 502 P.2d 1265, (Okla. Sup.Ct. 1972) (emphasis added). Whether appellees adequately raised the statute of limitations ground in objecting to the Court of Appeals judgment we do not know. What we do know is that the Oklahoma Supreme Court quieted title in appellees by rejecting appellants' constitutional claim. Either because the issue was not

properly before the court or because decision on it was not necessary, the statute of limitations issue was not reached."

Where a deprivation of constitutional rights is claimed, a state court's decision concerning matters of pleading or practice is not conclusive upon this Court. The United States Supreme Court may review a state court's determination that otherwise would close the door to any consideration of a claim of denial of a federal right. In *Brown* v. *Western Railway*, 338 U.S. 294, 94 L.Ed. 100, 70 S.Ct. 105 (1949), a railroad employee suing under a federal act failed to allege certain facts required under state pleading rules and the state court dismissed the complaint as insufficient. The United States Supreme Court held that the federal right cannot be defeated by the forms of local practice and that the complaint did in fact state a cause of action under the applicable federal act. In *Williams* v. *State*, 349 U.S. 375, 99 L.Ed. 1161, 75 S.Ct. 814 (1955), a defendant who had been convicted of a crime, subsequently charged that his constitutional rights had been denied by a jury selection method. The state appellate court refused to hear the complaint on the ground that defendant had not challenged the jury array at the outset and thereby had waived his right to do so and had not properly pleaded otherwise. The United States Supreme Court held that it would exercise jurisdiction even though the state court had decided the case on state grounds where the state law, although honestly applied and dictated by state precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights. In *Henry* v. *State*, 379

U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), the accused's counsel failed to object to the admission of certain evidence and the state appellate court held that such failure estopped the accused from complaining about tainted evidence. The judgment was vacated by the United States Supreme Court with an opinion which quoted Mr. Justice Holmes:

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. . . . Whether the right was denied or not given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment."

Having consistently claimed throughout many years of litigation that their constitutional right to notice of the taking of their property was denied by the existing tax sale procedures, Petitioners now respectfully request that this Court review the latest determination by the Supreme Court of Oklahoma that an alleged procedural defect will have the effect of baring Petitioners from asserting their constitutional right.

2.

PETITIONERS, UNDER STATE LAW, ARE NOT INDEPENDENTLY BARRED BY THE STATUTE OF LIMITATIONS.

A. Facts.

In order to understand whether the Oklahoma statute of limitations (12 Okla. Stat. 1961, §93) applies to the rights of Petitioners, a review of the facts of the matter is essential. Rather than repeat here the entire factual circumstances of the case, we would respectfully refer the Court

to the Brief of Appellants (Petitioners here) filed during May, 1973, in United States Supreme Court Case No. 72-922. However, as to the statute of limitations, Respondents base whatever rights they have upon a Resale Deed issued to them in May, 1956, recorded in June, 1956, and possession then taken by them of the surface of the land and thereafter maintained through a tenant. Only publication notice of the 1956 Resale was given, describing the land, and only the surface owner was named in the published notice. The mineral owners, Petitioners' predecessors, were not named in such published notice, nor personally notified in any way by service of process, mailing, posting or otherwise. They had no actual notice of the tax sale and were not on actual notice of the mineral claim of Respondents at any time until the present action was filed against them in January, 1965. The present action was commenced not by Petitioners, but against them by the oil and gas lessee, Christie-Stewart, Inc., to determine that the tax deed holders (Respondents) owned the minerals. The summons to Petitioners in this case in January, 1965, was the first notice of any kind that their mineral rights were in jeopardy, and they then immediately challenged that claim. At the trial of this case, one of the Respondents, Mr. Vaughn, testified that the tax claimants' possession was of the surface only and that they had not personally or through a third party attempted to explore or exploit the minerals, and in fact had not even executed an oil and gas lease other than the one involved in the present litigation to Christie-Stewart, Inc., who had also acquired an oil and gas lease from Petitioners to assure leasehold coverage. Thus, Petitioners had no notice of the tax sale either by direct notice or publication, no actual notice of the sale or the claim to the min-

erals by Respondents, nor any notice by reason of an attempt on the part of the tax deed holder to take physical possession of the minerals.

B. Failure of Due Process.

Notice is a constitutional requirement for validity of statutes of limitations. They are, insofar as real property is affected thereby, statutes of repose to effectuate a public policy to protect land owners against stale claims after evidence of title is lost, testimony is unavailable, and memory dims; 51 Am.Jur.2d *"Limitations of Actions"* §16. Possession of the land is requisite; 51 Am.Jur.2d *"Limitations of Actions"* §30. Not mere occupancy is sufficient, but an adverse possession which is so in opposition to the true owner that knowledge of a claim to the land can be assumed to be actually or imputably in the comprehension of the true owner. He must have known, or should have known, that his property was being claimed by the other person who is in adverse possession; 3 Am.Jur.2d *"Adverse Possession"* §48. In other words, notice of the adverse possession must be involved either actually or constructively. When such adverse possession continues for a certain period of time without challenge by the prior owner, the courts have concluded that the possessor's title should be upheld on the presumption of a conveyance, a "lost deed." But the key ingredient is notice of the claim of the possessor, actually or imputably brought home to the prior owner; 3 Am. Jur.2d *"Adverse Possession"* §48.

If the possession is not such as to give notice of the adverse claim, constitutional defects arise with respect to the courts' quieting title in the claimant. So long as the

original owner of land which has been sold for taxes remains in undisturbed possession, the statute of limitations does not run against him or prevent the maintenance of a suit by him to set aside the tax sale or remove the cloud on his title; 51 Am.Jur.2d *"Limitation of Actions"* §30. This is universally recognized, the reverse being said to offend both State and Federal Constitutions, as being a taking of property without due process of law; See Annotation on constitutionality at 7 A.L.R.2d 1366. The reason for this rule is that a statute of limitations which operates in absence of adverse possession would require one still in full enjoyment of property to bring an action to continue such enjoyment or title would pass to the claimant by reason of the statute. This would be a forfeiture by legislative command, a confiscation by statutory fiat, thus violating constitutional protection of property rights; *Lind* v. *Stubblefield*, 138 Okla. 280, 282 Pac. 365; *Plant* v. *Johnson*, 185 S.W.2d 711 (Ark.). Under the Constitution, property is not held as a tenancy at will subject to the permission of the Legislature; it can be taken from the owner only by due process of law and that must consist of more than simply legislation. Any argument or theory that the legislation itself satisfies due process requirements of the Constitution is itself a denial of due process and a confiscation. In Cooley, Constitutional Limitations, Vol. 2, 8th Ed., p. 762, the author states:

> "It has consequently been held that a statute which after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to

> legal proceedings by one who is already in the complete enjoyment of all he claims." See *People, ex rel.* v. *Simon*, 52 N.E. 910 (Ill.) and *Murrison* v. *Fenstermacher*, 203 P.2d 160 (Kan.).

If the constitutional requirement of due process were satisfied by the legislation which itself deprives the citizen of his property, the Constitution would then mean that no person should be deprived of his property unless the Legislature shall pass a law to effect the wrong. This would be throwing the restraint entirely away.

That an owner of undeveloped mineral rights remains in possession without activity on his part is also universally recognized; *Noble* v. *Kahn*, 206 Okla. 13, 240 P.2d 757; *Douglass* v. *Mounce*, 303 P.2d 430; 1A Summers Oil and Gas §139. The last cited authority states the following:

> "Where a separate estate or interest in oil and gas has been effectually created by grant or exception, it is held by the courts in all states, except Louisiana, that such estate or interest is not subject to termination by non-user or abandonment for failure to produce oil or gas."

There follows a full page of citations to the case law of several states, including the above cited Oklahoma case, *Noble* v. *Kahn*. In that case, the Oklahoma Supreme Court stated:

> "The plaintiffs' contentions that the defendants are barred by the statute of limitations is also without merit. The defendants' mineral rights had been severed from the title to the surface and possession of the surface by its owner is not adverse to owner of the minerals. It was not alleged or claimed by plaintiffs that they had taken actual possession of the minerals

> by drilling wells or opening mines for the statutory period. Where there is a severance of the mineral estate from the surface estate, the owner of the minerals does not lose his right *or his possession* by any length of non-user, nor can the owner of the surface acquire title by prescription to the minerals by his continued occupancy of the surface alone." (Emphasis supplied.)

Thus, the Oklahoma statute of limitations must, constitutionally, require actual possession of the minerals before it can operate, and in the present case no assertion of possession of the minerals was involved on the part of the tax sale claimants, Respondents. On the contrary, Mr. Vaughn himself testified that no attempt to do any action which would amount to a taking of possession of the minerals occurred subsequent to the tax sale. Had Petitioners examined the land to any extent, nothing on the land would have shown them that Respondents were claiming the minerals. Nothing put them on notice either actually or constructively, because nothing changed. The mineral owners remained undisturbed in their possession of the minerals.

Consequently, the statute of limitations cannot apply, constitutionally, against the mineral owners' claims. The severed mineral rights were and are a separate ownership estate, as completely separate from the surface of this tract as is the surface of the adjoining tract. The only justification for the taking of the minerals with the surface for non-payment of taxes by the surface owner is the provision of 68 Okla. Stat. 1961 §432(f) as follows:

> "The issuance of such deed . . . shall vest in the grantee an absolute and perfect title in fee simple in said land."

This is construed in *Walker* v. *Hoffman*, 405 P.2d 57, and prior cases, as providing the Resale purchaser "a virgin and fee simple title to the described tract, including the minerals." But it is obvious that this effect can be produced only by the legislation itself and alone, since no notice has been given the mineral owner except by the legislation itself and alone. The mineral owner has at all times remained in possession and therefore the legislation, in purporting to operate against the mineral rights, or in being construed in that manner, violates due process requirements. It is a taking of property, still in possession of the owner thereof, by legislative fiat, unconstitutional under the authority cited above.

C. Prior Oklahoma Decisions.

The foregoing is recognized as being applicable law in Oklahoma with regard to severed mineral rights at the time of a tax sale in *Walker* v. *Hoffman*, 405 P.2d 57, the holding being that the Oklahoma statute of limitations cannot be asserted by a tax claimant without adequate notice or actual possession of the minerals. That case dealt with the situation of a Certificate Tax Deed and contains language attempting to differentiate a Resale Tax Deed, as in this present case. It should first be noted that any language in that opinion dealing with a Resale Deed, and the effect of the statute of limitations with respect to a Resale Deed, is *obiter dictum* because only a Certificate Tax Deed was there involved. However, the case does indicate and stand for the proposition, in line with the authority cited in Section B above, that possession of minerals is a necessary ingredient for notice purposes before the statute of limitations becomes applicable:

> "In addition to the fact that the applicant for the certificate deed in the instant case did not serve notice upon the owners of the severed mineral interest, as required by 68 O.S. 1961, §451, there is the further stipulated fact that neither the plaintiff nor her predecessor ever engaged in any mining or drilling operations upon the land conveyed by the certificate deed. Thus, it cannot be said that the defendants and their predecessors were *put upon notice* that plaintiff and her predecessors, were claiming the minerals adversely to them." (Emphasis supplied.)

In the same case, the Oklahoma Supreme Court quoted the following from Blackwell on Tax Titles, Sec. 944:

> "When the tax proceeding is void and the tax sale purchaser is not in possession, it is beyond the power of the legislature to transfer to the purchaser the title of the owner by lapse of time alone. . . . A deed upon a void sale cannot draw to it the constructive possession of unoccupied land."

Also quoted is the following from *Strickland* v. *Reeburgh*, 362 P.2d 1110:

> "Where there has been a severance of the legal interest in the minerals from the ownership of the land, adverse possession of the surface is not adverse possession of the mineral estate, even though title to the minerals be asserted all the time. Where ownership of the surface and of the mineral rights has been severed, the only way the Statute of Limitations can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening and operating mines for the statutory period."

See also 3 Am.Jur.2d *"Adverse Possession"* §218 and 51 Am.Jur.2d *"Limitations of Actions"* §406.

As stated before, the *Walker* v. *Hoffman* opinion attempts to draw a distinction as to a Resale Tax Deed, but there is nothing but a legal fiction to differentiate it from the Certificate Tax Deed situation. That legal fiction is the proposition that a Resale creates a "virgin and fee simple title to the described tract" based upon the provision in 68 Okla. Stat. 1961 §432(f), *supra*, but the only reason given supporting it, as affecting the severed mineral estate, is that the published notice of a Resale described the land to be sold. On the other hand, it does not purport to name the owners of the minerals; there is no service of process on them; there is no mailing to them; there is no posting of notice on the property; there is in fact nothing to give them the semblance of constitutionally required notice. Not only do they not receive notice at the time of the Resale, but they also have not been effectually notified at the previously conducted "Original Sale"; See Brief of Appellants filed in United States Supreme Court Case No. 72-922 in May, 1973, concerning constitutionality of notice in Oklahoma tax Resales; See also 20 Okla. L.R. 365; and see Annotation on Notice required to commence statutory limitation period, 5 A.L.R.2d 1021. The mineral owners are in every sense "sitting ducks" under the construction that a Resale not only takes the severed mineral rights but also places the tax purchaser in possession of the minerals by reason of possession of the surface. Such a construction is violative of all of the authority cited above because it is based upon a legislative command that, *regardless of possession*, the Resale Deed shall transfer title to the severed minerals, a separate property interest. This the Legislature cannot do under the Constitution. It constitutes a permitted taking of property without due process of law.

D. Failure of Equal Protection of the Law.

Any such construction of the Oklahoma statute of limitations with respect to a Resale Tax Deed would also violate the equal protection requirement of the Federal Constitution. The actual holding in *Walker* v. *Hoffman, supra*, is that the statute of limitations cannot apply to severed mineral interests in absence of valid notice to the owners thereof, either through the Certificate tax sale proceeding (the statute requires mailing to the mineral owners as construed by that case) or by actual physical possession of the minerals in absence of valid notice as required by the statute. Here, in the present case, we have failure of notice adequate under the Constitution as well as statutorily required, which should be considered much more serious failure of notice than simply failure of statutory notice. Here also, we have failure to take physical possession of the minerals on the part of the tax sale claimant. Accordingly, a holding here that adcquate notice of the Resale tax sale proceedings or that physical possession of the minerals is not necessary for the applicability of the statute of limitations would be a denial of the equal protection of law. It would be grossly unequal and unfair to say that a mineral owner whose rights were purportedly taken by a Certificate Tax Deed was not prevented from challenging that taking whereas if that same mineral owner's rights were purportedly taken through a Resale, he could not then challenge the taking. In both situations, he was given no adequate constitutional or statutory notice. In neither situation was he put on notice by actual adverse possession of the minerals. Equal protection of the law demands that mineral owners be accorded equal rights and *Walker* v.

Hoffman holds that the Certificate Deed, without notice or possession, can be challenged regardless of the statute of limitations. The same holding is here required with respect to a Resale Deed, for equal protection of the law; *Williams* v. *Rhodes*, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968); *Levy* v. *Louisiana*, 391 U.S. 68, 20 L.Ed.2d 436, 88 S.Ct. 1509 (1968); *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972); *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 42 L.Ed. 853, 18 S.Ct. 445 (1898); *Hartford Steam Boiler Insp. & Ins. Co.* v. *Harrison*, 301 U.S. 458, 81 L.Ed. 1223, 57 S.Ct. 838 (1937); *Morey* v. *Dowd*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957).

E. Lack of Constitutionally Valid Notice Precludes the Running of the Statute of Limitations.

In cases where the question of lack of notice is involved, application of limitation statutes or laches is frequently raised. It is only natural that this is true, because if proper notice had been given, a timely opportunity to be heard would have occurred. Failure to give notice creates the very situation in which the party who was not given notice must come into court "late," asking his remedy belatedly. Thus, for the Court to countenance the assertion of limitations under such circumstances would be to accept the poisoned apple whereby all constitutional rights could be eliminated. Of what value is a constitutional right to notice if, after notice is unconstitutionally withheld, the offended party cannot receive his rights because of mere passage of time before asserting them when he finally discovers the offense?

The Supreme Court of the United States has consistently rejected such arguments. In *City of New York* v. *NY, NH & H R.R.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), the railroad sought to bar the City's liens because they had not been asserted within the statutory time after publication notice. The Court rejected that argument because the publication notice was not sufficient notice, and held in favor of the City and the enforcement of its liens. In *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), the taxpayer's right of redemption expired before her Committee became aware her property was being sold for unpaid ad valorem taxes. The U. S. Supreme Court held that notice given to a known incompetent was insufficient to set in motion the statutory limitation on assertion of her rights when later discovered. In *Walker* v. *City of Hutchinson*, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956), the time authorized by statute had elapsed for an appeal from the compensation awarded in a condemnation. The U. S. Supreme Court held publication notice was not sufficient to create a bar to the landowner's right to a hearing on just compensation. In *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed. 2d 241 (1956) (refer to the appealed Wisconsin Supreme Court opinion reported at 76 N.W.2d 341), the property owner was assessed for street improvements and he claimed he had no actual notice of the assessment until after it was too late to protest, only publication notice having been given. Rejecting the statute of limitations argument, the United States Supreme Court required the Wisconsin Court to review its affirmance of the assessment in the light of *City of Hutchinson*. In *Schroeder* v. *City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 88

A.L.R.2d 1398 (1962), the landowner had filed no claim for damages from the diverting of a river until after the three-year statutory limitation had elapsed. Only publication notice had been given. The City argued that the limitation barred her rights. The U. S. Supreme Court held that the limitations could not be asserted because the notice given was not adequate.

In all of the cited cases, all dealing with claims with respect to land, the U. S. Supreme Court was faced with the argument that the offended parties acted too late to be permitted to assert their rights—that a statutory limitation ran against the assertion of those rights. In no case was that argument accepted. The basic reason why that was not acceptable is that there had been in each instance a failure of constitutionally required notice and therefore nothing had set in motion the operation of the statute of limitations.

The case with facts closest to the instant case is *Schroeder*. There, the City had changed the course of the Neversink River, which flowed through appellant's land, after giving the statutory notice by publication in a small town newspaper without including her name therein. That notice and its contents and deficiencies was quite similar to the notice in the present case in that the latter only described the land, among many other tracts, and did not name the mineral owners. Posting of such notice also occurred in *Schroeder* but not on appellant's land. No posting occurred in the present case. The New York statute limited a claim for damages to be filed within three years and there are indications that during that three years the flow of water through appellant's land must have made

apparent the diversion upstream: "The majority opinion in the New York Court of Appeals seems additionally to have drawn support from an assumption that the effect of the City's diversion of the river must have been apparent to the appellant before the expiration of the three-year period within which the statute required that her claim be filed. 10 N.Y.2d, at 526, 572; 225 N.Y.S.2d, at 213; 180 N.E.2d 568. There was no such allegation in the pleadings, upon which the case was decided by the trial court. But even putting this consideration aside, knowledge of a change in the appearance of the river is far short of notice that the City had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion. That was the information which the City was constitutionally obliged to make at least a good faith effort to give personally to the appellant—an obligation which the mailing of a single letter would have discharged."

That set of circumstances is similar to the present case in this: Respondents have based their argument in reliance upon the Oklahoma five-year statute of limitations on their occupation of the surface of the land here in question. It is clear that during that time they made no attempt to explore or exploit the minerals under the land. They executed and recorded only one oil and gas lease during that time and that is the one immediately challenged in this case. Petitioners owned only the severed mineral rights and at no time made any claim to the surface. Accordingly, occupation of the surface by Respondents or anyone else would have put Petitioners on no notice or apprehension concerning their severed mineral rights. Had Petitioners simply

driven by the land, or had they even examined it inch by inch, nothing they could have found on the land would have shown them any indication other than that the surface was being occupied by Respondents just as the surface had previously been occupied by others before. Therefore, the possession of the surface that Respondents can only rely upon to invoke the five-year statute of limitations is not applicable because as the United States Supreme Court pointed out in *Schroeder*, the information which the County and Respondents were "constitutionally obliged to make at least a good faith effort to give personally to the (predecessors of Petitioners)—an obligation which the mailing of a single letter would have discharged," was that a sale of the land was to be made for non-payment of taxes and that the sale would be deemed to include the severed mineral rights. That was not done, and therefore the statute of limitations constitutionally cannot be invoked.

3.

PETITIONERS WERE NOT GIVEN NOTICE OF THE TAX SALE PROCEEDINGS, WHICH DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED THEM THE EQUAL PROTECTION OF THE LAWS.

The questions concerning constitutionally inadequate notice of the tax sale proceedings under which the Oklahoma Supreme Court has held Petitioners' severed mineral interests have been taken and sold to Respondents, have been briefed and argued in the United States Supreme Court in Case No. 72-922. The facts of the case were that John N. Paschall and Walter B. Paschall, Jr., were the record owners in equal shares of an undivided 15/16 mineral rights and H. Grady Ross owned the other undivided 1/16 min-

eral rights under the SW/4 NW/4 of Section 28-9N-7E, Seminole County, Oklahoma. The surface was separately owned and the above named mineral owners had no interest in the surface. Petitioners are successors in interest to the above named mineral owners.

The surface owner failed to pay the ad valorem taxes for the year 1952, and the County Treasurer included the land in the Original Sale on the first Monday of November, 1953. Publication notice thereof was given in accordance with the applicable statute (68 Okla. Stat. §382), none of the owners of interests in the land being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral owners. The statutes did not require any such notice other than publication in the manner actually conducted. Seminole County became the purchaser at such Original Sale.

The land remained unredeemed and after two years was included in the Resale conducted on the second Monday in May, 1956. Notice of the Resale was given by publication in accordance with the applicable statute (68 Okla. Stat. §432b), only the surface owner being named therein. No personal notice to the above named mineral owners was served upon them nor was there posting of notice on the land or elsewhere or mailing of notice to such mineral owners. The statutes did not require any such notice other than publication in the manner actually conducted. At such Resale, Otis Garrett was the successful bidder and the Resale Deed was made out to Respondents, R. W. Garrett and R. H. Vaughn, who now claim the entire interest in the land incuding all the mineral rights.

A certified transcript of all the above mentioned tax sale proceedings on file in the office of the County Treasurer has been admitted in evidence in this case. The parties have stipulated that the above named mineral owners received no actual notice of either the Original Sale or the Resale. Walter B. Paschall, Jr., died testate in the year 1965, and John N. Paschall died testate in the year 1966, and H. Grady Ross died testate in 1970, and their respective successors have been substituted as parties, constituting all of the Petitioners.

In the year 1963, the plaintiff in this action, Christie-Stewart, Inc., purchased an oil and gas lease from Mr. Garrett and Mr. Vaughn. Later, a separate lease was purchased by the same lessee from Walter B. Paschall, Jr., and John N. Paschall, and another from H. Grady Ross. Mr. Vaughn testified that no other lease had been previously executed by the tax sale purchasers, that they had conducted no previous exploration for oil, gas, or other minerals on the land, and that no production had been established in the interim between the tax sales of 1953-1956 and the leasing to Christie-Stewart, Inc. In order to determine that they had valid leasehold coverage prior to drilling a well on the land, Christie-Stewart, Inc., filed this action and an order of the Trial Court was thereafter entered quieting the oil and gas leasehold title in that corporation but reserving for future consideration the question of which set of claimants had title to the mineral rights and, consequently, which oil and gas lease was valid and which was void.

A well was drilled by Christie-Stewart, Inc., in 1965, and production was established which has continued to a

recent time. Royalties have been suspended by the purchaser of the production pending determination of the owners of the mineral rights, *i.e.*, as between Mr. Garrett and Mr. Vaughn on the one hand and the Paschall devisees and Mr. Ross on the other. It is this question that the District Court of Seminole County, Oklahoma, was asked to decide and this turns on the validity of the taking of the mineral rights under the Original Sale of 1953, and the Resale of 1956. The Trial Court entered its Judgment on November 3, 1969, that the Resale Tax Deed of 1956 was valid and conveyed the full fee simple title including the mineral rights here in dispute.

It is the position of the Petitioners and has been since the inception of this litigation, that the tax sale proceedings in both the Original Sale of 1953 and the Resale of 1956 failed to include the essential element of constitutional notice to the then owners of the mineral rights, a separate and severed property interest. Such property owners were thereby denied due process of law. Since Oklahoma law requires notice to be given to the owners of severed mineral interests in other types of tax sale proceedings but not in Resale proceedings, Petitioners were also denied the equal protection of the laws. Therefore the purported taking of their property was void *ab initio*.

The federal questions stated above were raised in the Trial Court by Amendment to Answer filed by Appellants, and argued and briefed in the Trial Court (Transcript of Trial Court Proceedings, pages 18 and 19) and adversely ruled upon by the Trial Court. These federal questions were thereafter the basis of the appeal Brief of Plaintiffs in Error and decided in favor of Appellants by the Oklahoma

Court of Appeals, Division No. 2, the opinion dealing specifically with such questions. Thereafter, the Supreme Court of Oklahoma again reviewed the case and reversed the judgment of the Oklahoma Court of Appeals on the specific federal questions stated above, affirming the judgment of the Trial Court.

4.

THE STATE COURT HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT AND HAS DECIDED SUCH QUESTIONS IN A WAY NOT IN ACCORD WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

Appellants were the owners of the entire severed mineral interest in the land with no ownership in the surface. Under Oklahoma law, severed mineral interests are separate property rights, but the owners thereof have no duty to pay ad valorem taxes, that duty falling exclusively upon the owner of the surface. At the Original Sale, only publication notice was given and no names of owners were included in the notice. At the Resale, only publication notice was given and only the name of the surface owner was recited in the notice. The statutory requirements of notice of the Resale, 68 O.S. 1951 §432b, required inclusion of the "name of the owner of said real estate." Thus, as to the mineral owners, the statutory procedure itself was not effectively followed. Their separate property interests were not accorded due process of law, even under the Resale statute. Furthermore, this manner of notification (publication without naming the affected owners) does not adequately fulfill the notice requirements of the United States

Constitution because it amounts to no more than a "mere gesture" at notification. It is not a means of notification "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it"; *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). At no time did the fact of the tax sale ever actually come to the attention of the mineral owners until an offer to purchase an oil and gas lease was made to them and this action was filed against them. Since neither adequate constructive notice was given nor actual notice received, due process of law was not carried out as to the rights of the mineral owners. The tax sale procedure constituted an attempted taking of the mineral owners' property without due process of law. Likewise, the equal protection of the laws was denied Petitioners because under Oklahoma decisions and statutory law, the owners of severed mineral interests are entitled to separate and personal notice in tax sale proceedings conducted under other sections of the tax sale statutes.

The Oklahoma statutory tax sale procedure is administrative in nature. It provides in detail the steps to be followed by the county officials who conduct the tax sales. In some steps, the statute sets forth the forms to be used. The notice requirements for each occasion of sale are specified in the statute. It requires no court proceedings to perfect title acquired through the tax sale.

A review of tax sale requirements of other states shows that numerous states have statutory procedure similar to that of Oklahoma. A wide geographical distribution of those states is indicated, *e.g.*, Arizona, Florida, Massachusetts, Idaho, Indiana, Colorado and North Dakota and

many others. Another group of states have statutes providing for direct notice to the owners whose property is being taken. Such notice takes various forms: formally served process, mailing by regular mail or in some states by certified mail, or publication notice addressed specifically to the individual owners concerned. Another group of states have statutes which require a fully judicial foreclosure of the tax lien after bringing the owner of the land into court through normal judicial process. The Oklahoma procedure is an example of the least strict requirements of notice to the owner of the land, especially with regard to Resales by the county after the Original Sale has vested it with the tax title. The Oklahoma Supreme Court has decided that no notice to the severed mineral interest owner is necessary at the Resale. When it is realized that the county acquired its tax title through the Original Sale which requires no naming of the owner in the publication notice of sale and also requires no direct notice to the owner, it becomes shockingly obvious that a taking has occurred without due process. Tax sale procedure in other states is similar.

The substantial character of the federal questions raised herein is also illustrated by the numbers and class of owners affected throughout the United States by this type of tax lien enforcement. Page upon page of newspaper listings of property to be sold for taxes occur in many states throughout every year. In the major percentage of instances the taking is from individual persons who are predominantly of the lower income group. Thus the impact and detrimental effect of the statutory procedure falls most heavily upon those least likely to be able to defend their

property rights, least likely to be actually apprised by the methods of notification used, and least likely to understand the meaning of the notice if by chance it does come to their attention.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari be issued for the purpose of reviewing the judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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April, 1976

APPENDIX

FILED
SUPREME COURT
STATE OF OKLAHOMA
NOV 5 1974
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

* Christie-Stewart, Inc., a corporation,	)	
v.	)	
Walter B. Paschall, Jr., et al., Appellants,	)	No. 43,907
and	)	
R. H. Vaughn, et al., Appellees.	)	

REMAND FROM UNITED STATES SUPREME COURT

* * * * *

Upon remand from the Supreme Court of the United States, Paschall v. Christie-Stewart, Inc., ___ U.S. ___, 94 S.Ct. 313, 38 L.Ed.2d 298, for the purpose of construing Appellants' rights under 12 O.S. 1951 § 93 (3) and (6); held that Appellants have abandoned rights to attack the judgment of the trial court on the question of statute of limitations.

* * * * *

COURT OF APPEALS, DIVISION 2, REVERSED; TRIAL COURT AFFIRMED

* * * * *

* Christie-Stewart, Inc. has taken no part in these proceedings.

William J. Legg, of Andrews, Mosburg,
Davis, Elam, Legg & Baxter
Oklahoma City, Oklahoma — For Appellants,

Joe S. Rolston III, of
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Oklahoma City, Oklahoma — For Appellees.

DOOLIN, J.

We have been requested by remand from the U. S. Supreme Court in Paschall v. Christie-Stewart, Inc., ___ U.S. ___, 94 S.Ct. 313, 38 L.Ed.2d 298, to decide:

> " . . whether the appellants had preserved the right to challenge the trial court's holding that the state's (Oklahoma's) statute of limitations[1] is a bar to their mineral rights claim, and if so, whether under state law the statute of limitations independently bars appellants' claim, irrespective of the constitutional adequacy of the tax sale notice provisions of 382 and 432(b)[2]." (parenthetical phrase supplied)

[1] 12 O.S. 1961 § 93 reads in part:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter;
>
> • • •
>
> (3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the tax deed.
>
> • • •
>
> (6) Numbered paragraphs 1, 2, and 3 shall be fully operative regardless of whether the deed or judgment or the precedent action or proceeding upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date."

[2] 68 O.S. 1951 §§ 382 and 432(b); see 68 O.S. 1971 §§ 24331 and 24312 as amended by S.B. No. 616, 34th Legislature, 1974 Oklahoma Session Laws, 34th Legislature, Second Regular Session, pg. 169.

We answer the first question in the negative, and having so answered, believe it unnecessary to respond to the second inquiry.

For the purposes of this opinion we condense the fact situation as follows.[3] Appellants (Paschall, et al.) were the previous record title holders to an undivided and undeveloped 15/16 mineral estate in and under certain real premises in Seminole County, Oklahoma. The surface owners failed to pay the 1952, 1953, 1954, and 1955 ad valorem taxes and consequently the premises were sold, by original tax sale in 1953 and by resale tax sale in 1956. The county treasurer issued a resale tax deed to the Appellees (Vaughn and Garrett) who thereafter claimed fee simple title. In 1963 Christie-Stewart, Inc. took an oil and gas lease from both the Appellants and the Appellees and in 1965 a producing well was drilled on the premises. Runs are held in suspense since discovery by the Lessee. Immediately after discovery, Christie-Stewart, Inc. brought a quiet title action against both the Appellants and the Appellees and also sought determination of the ownership of the minerals. The trial court determined: (1) under 12 O.S. 1961 § 93 (3) and (6) that the five-year statute of limitations had run against the Appellants; (2) that the resale tax deed was validly issued under 68 O.S. 1961 § 432 and existing tax sale procedures.

We further quote from the U. S. Supreme Court footnote 4 of Paschall v. Christie-Stewart, Inc., supra:

> "Whether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklacourts below. Cf. Schroeder v. City of New York, 371

[3] For a complete discussion of the facts and background see Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (1972). Cf. Walker v. Hoffman, 405 P.2d 57 (Okl., 1965).

> U.S. 208, 213-214, 9 L.Ed.2d 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398 (1962). We intimate no view on this issue."

We likewise express no opinion on this issue.

On appeal from the trial court's decision, the Court of Appeals, Division 2, reversed the trial court and held the tax sale procedures deficient under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Upon certiorari to this Court we reversed the Court of Appeals and sustained the trial court's ruling. Thereafter on appeal to the U. S. Supreme Court, our judgment was vacated and the cause remanded as aforesaid.

We note at this point that the Appellant, although he included in his Petition in Error an attack upon the judgment of the trial court as to adverse possession under 12 O.S. 1951 § 93 (3) and (6), failed to advance said point or argue same in this Court or in the U. S. Supreme Court. Having failed to argue the possession question, it is waived; for we held in Hayward v. Ginn, 306 P.2d 320, 322 (1957):

> "Only those questions argued in the briefs are treated in this opinion, the others noted on the petition in error being deemed waived. Chicago, Rock Island & Pacific Ry. Co. v. State, 203 Okl. 659, 225 P.2d 363. . . ."

In Chancellor v. Chancellor, 202 Okl. 389, 214 P.2d 261 (1950), we held:

> "Assignments of alleged error not presented in the briefs will be treated as abandoned."

See also Stinson v. Sherman, 405 P.2d 172 (1965); Harrington v. City of Tulsa, 120 Okla. 20, 39 P.2d 120 (1934); Ry. Express Agency v. Stephens, 183 Okl. 615, 83 P.2d 858 (1938); Klaus v. Fleming, 304 P.2d 990 (1956).

Since the judgment of this Court in Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (1972) has been vacated by

Paschall v. Christie-Stewart, Inc., ... U.S. ....., 94 S.Ct. 313, 38 L.Ed.2d 298, this Court does now reverse the judgment of the Court of Appeals, Division 2 (Oklahoma) and affirms the judgment of the trial court for the reasons hereinabove stated.

COURT OF APPEALS, DIVISION 2, REVERSED; TRIAL COURT AFFIRMED.

ALL JUSTICES CONCUR.

SUPREME COURT OF THE UNITED STATES

No. 72-922

Mary Louise Green Paschall et al., Appellants,	)	
v.	)	On Appeal from the Supreme Court of Oklahoma.
Christie-Stewart, Inc., et al.	)	

[November 19, 1973]

PER CURIAM.

In this case we noted probable jurisdiction, 411 U. S. 915 (1973), in order to consider whether the published notice provisions of the then applicable Oklahoma tax-sale statutes, Okla. Stat., Tit. 68, §§ 382 and 432b (1951), comported with due process of law guaranteed by the Fourteenth Amendment.[1] See *Mullane* v. *Central Hanover* Bank & Trust Co., 339 U. S. 406 (1950). This was the only

[1] The ad valorem taxes in question were for the year 1952. The original tax sale took place in November 1953 and the resale in May 1956. Okla. Stat., Tit. 68, §§ 383 and 432 (1951). The statutes cited (§§ 382, 383, 432, and 432b) were repealed by Okla. Sess. Laws, 1965, c. 501, § 3, and replaced by corresponding provisions of the State's present Ad Valorem Tax Code, namely, Okla. Stat., Tit. 68, §§ 24312, 24313, 24329, and 24331 (1971).

issue addressed by the appellate courts of Oklahoma[2] and by the parties in the Jurisdictional Statement and the papers responsive thereto filed with this Court.

After oral argument and upon our review of the record, it now appears that there might have been an independent and, possibly, an unchallenged ground for the judgment of the state trial court, *viz.*, the running of the Oklahoma period of limitation for adverse claims.[3] If that should prove to be the case, any decision by this Court would be advisory and beyond our jurisdiction. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636 (1874).

The judgment of the Supreme Court of Oklahoma is therefore vacated and the case is remanded to that court

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[2] See *Christie-Stewart, Inc.* v. *Paschall*, 502 P.2d 1265 (Okla. Sup. Ct. 1972). The earlier opinion of the Oklahoma Court of Appeals, Division 2, is not reported; it is reproduced in the Jurisdictional Statement, App. A, p. vii.

[3] The trial court's judgment read in part as follows:

"(2). The Court Further Finds, Orders, Adjudges and Decrees that from the date of the recording of said resale tax deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in the open, continuous, visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants, are further forever barred and precluded by the statute of limitations, from seeking to assert the invalidity of said resale tax deed, as provided by 12 O.S. 1961, Sec. 93 (3) and (6)." Jurisdictional Statement, App. A, p. xvii.

Okla. Stat., Tit. 12, § 93 (1961), reads:

"§ 93. Limitation of real actions.—Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter:

• • • • • •

"(3). An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the tax deed . . . provided, nothing herein shall be construed as reviving any

to consider whether the appellants preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to their mineral rights claim, and, if so, whether, under state law, the statute of limitations independently bars appellants' claim, irrespective of the constitutional adequacy of the tax-sale notice provisions of §§ 382 and 432b.[4] Cf. *Walker* v. *Hoffman*, 405 P. 2d 57 (Okla. Sup. Ct. 1965).

It is so ordered.

---

[3] (Continued)

cause of action for recovery of real property heretofore barred nor as divesting any interest acquired by adverse possession prior to the effective date hereof.

• • • • • •

"(6). Numbered paragraphs 1, 2, and 3 shall be fully operative regardless of whether the deed or judgment or the precedent action or proceeding upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date."

[4] Whether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma courts below. Cf. *Schroeder* v. *City of New York*, 371 U. S. 208, 213-214 (1962). We intimate no view on this issue.

SUPREME COURT OF THE UNITED STATES

No. 72-922

Mary Louise Green Paschall et al., Appellants, v. Christie-Stewart, Inc., et al.) On Appeal from the Supreme Court of Oklahoma.

[November 19, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

Appellants claim title to the mineral interests here in controversy through deeds recording the severed interests on the books of the Seminole County Clerk in 1926 and 1930. In 1952 the owner of the separate surface interest failed to pay ad valorem taxes and the county satisfied its tax claim by selling the entire fee to the appellees after "notice" through newspaper publication. The tax sale statutes did not require that notice be given to the mineral owners by way of personal service, mailing or posting and no such notice was attempted. In an action to quiet title appellants contended that, as record owners of the mineral rights, they were never given constitutionally sufficient notice of the tax delinquency proceedings and as to them the proceedings were invalid. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 406 (1950).

The trial court, finding the tax sale proceedings valid and finding appellants' attack on the tax sale deed barred by the statute of limitations, quieted title in appellees. The Oklahoma Court of Appeals reversed that judgment but was itself reversed by the Oklahoma Supreme Court, each court addressing itself expressly only to the constitutional claim. The Court today remands the case to determine whether appellants adequately preserved the right to challenge the adverse trial court ruling on the

statute of limitations issue and whether this may serve as an independent bar to the assertion of their claim.

It should first be noted that proper preservation of this issue in the state courts is a hurdle facing not the appellants but the appellees. The Oklahoma Court of Appeals quieted title in appellants and thus must necessarily have found not only that the tax sale was constitutionally infirm but that the appellants' claim was not time barred. The Oklahoma Supreme Court reversed that judgment and affirmed the judgment of the trial court after finding that "[*t*]*he* question for decision is whether the Oklahoma statutory procedure [complies] with due process of law." *Christie-Stewart, Inc.* v. *Paschall*, 502 P.2d 1265, (Okla. Sup. Ct. 1972) (emphasis added). Whether appellees adequately raised the statute of limitations ground in objecting to the Court of Appeals judgment we do not know. What we do know is that the Oklahoma Supreme Court quieted title in appellees by rejecting appellants' constitutional claim. Either because the issue was not properly before the court or because decision on it was not necessary, the statute of limitations issue was not reached.

What faces this Court is thus a decision quieting title in appellees by rejecting appellants' federal constitutional claim. As the majority notes, this was the only issue addressed by the parties in the Jurisdictional Statement and the responsive papers filed with this Court. When a constitutional adjudication is not the only basis on which a state court judgment rests a review of that adjudication by this Court would be advisory since the judgment would rest on its independent grounds regardless of the outcome of our review. But the only issue before us in this case is a constitutional one since the only basis for the reversal below is the rejection of appellants' constitutional claim. When a decision rests only on a constitutional determination, a review of that determination is dispositive of the correctness of the decision and is thus not advisory. I would therefore face the constitutional claim at this point.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SEP 26 1972
SUPREME COURT
OF OKLAHOMA
ANDY PAYNE
CLERK

Christie-Stewart, Inc., a Corporation,
Plaintiff,
vs.
Walter B. Paschall, Jr., and John N. Paschall, et al.
Defendants,
R. W. Garrett and R. H. Vaughn,
Cross-Defendants.

No. 43,907

FOR OFFICIAL PUBLICATION

CERTIORARI TO THE COURT OF APPEALS,
DIVISION NO. 2

Action by Christie-Stewart, Inc., plaintiff (oil and gas lessee) to quiet title and to determine whether the defendants, the Paschalls and Ross, or the defendants, Garrett and Vaughn, were the owners of the minerals and entitled to the royalties produced under their lease. The trial court, Honorable Bob Howell, Judge, held that defendants, Garrett and Vaughn, acquired title to the minerals under a valid Resale Tax Deed. The Court of Appeals, Division 2, held in favor of the Paschalls and Ross after first finding that the Resale Tax Deed was void for lack of adequate notice and due process. Garrett and Vaughn seek certiorari.

CERTIORARI GRANTED; JUDGMENT OF THE APPELLATE COURT REVERSED; JUDGMENT OF THE TRIAL COURT AFFIRMED.

William J. Legg,
Andrews, Mosburg, Davis, Elam,
Legg and Kornfield, Oklahoma City,

Jack Highley,
Highley, Highley and Short,
Oklahoma City, For Defendants, the Paschalls and Ross

Richard S. Roberts,
T. H. Williams, Jr. For Defendants, Garrett and Vaughn.

JACKSON, J.

The question for decision is whether the Oklahoma statutory procedure for the sale of real property for delinquent ad valorem taxes complies with constitutionally adequate notice and due process of law. A brief statement of the facts will explain how the issue arose.

Prior to 1952 the Paschalls and H. Grady Ross acquired by mineral deeds 15/16ths of the minerals in and under a 40 acre tract of land in Seminole County, Oklahoma. The surface owner failed to pay the ad valorem taxes for the year 1952, and pursuant to statute the County Treasurer included the land in the Original Sale on the 1st Monday in November, 1953. Publication notice of the Original Sale was given prior to the sale in the manner provided by the statute. There being no bidders at the Original Sale, Seminole County became the purchaser and acquired a certificate which in legal effect was an ad valorem tax lien.

The 1952 taxes were not paid during the next two years by the surface owner or by the mineral deed holders and, pursuant to statute, the County Treasurer included this land in the Resale conducted on the second Monday in May, 1956. Publication notice of the Resale was given in accordance with the statute prior to the sale and the mineral deed holders, the Paschalls and Ross, did not receive notice of the sale either by personal notice, mailing, or

posting. Garrett and Vaughn were the successful bidders at the Resale and claim a fee simple title. Their bid was in excess of the amount of taxes due and the surface owner received the surplus. He is not a party in this action.

In 1963 Christie-Stewart, Inc. (plaintiff herein) acquired separate oil and gas leases from Garrett and Vaughn and from the Paschalls and Ross. Plaintiff brought this action to quiet title to its leases and to determine whether Garrett and Vaughn acquired title to the mineral rights by their Resale Tax Deed, or whether the mineral rights remained in the Paschalls and Ross. Oil was discovered on the land in 1965 and royalty payments have been suspended pending decision of the ownership of the mineral rights.

The trial court, consistent with our statutes and former decisions of this court, held that the Resale Tax Deed purchasers (Garrett and Vaughn) were the owners of the minerals. The Paschalls and Ross appealed. The Court of Appeals, Division No. 2, relying upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241; and New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, concluded that publication was not adequate notice and under the circumstances of this case reversed the trial court.

It is readily apparent that in each of the cited cases the court was dealing with law suits or actions where the statute did not specifically designate the time and place where the action or proceeding would be filed and action taken. In *Mullane* the trustee was required to make an accounting *twelve to fifteen months* after the establishment of the trust fund and *triennially thereafter*. In *Walker* the City could file its condemnation proceeding at its convenience. *Wisconsin Electric Power Co.* involved special assessments for street improvements, and *New York* involved a

bankruptcy proceeding. To this list may be added Schroeder v. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255, 89 A.L.R. 2d 1398. See also Due Process in Oklahoma Tax Sales, 20 Okla. Law Rev. at p. 374. In each of the cited cases publication was insufficient notice because it would require a property owner to constantly examine the legal notices contained in newspapers to determine whether his property was in jeopardy. In each of the cited cases the landowner was not aware that he should examine the published notices. He could not forecast with certainty when, if ever, an action would be filed.

In the instant case the land owner, and those having interests therein, knew that ad valorem taxes would be assessed, knew when they would be due, and could forecast with certainty the day, the hour, and place where ad valorem tax foreclosures would occur if the taxes were not paid. Since the Original Sale and Resale occurred in 1953 and 1956, respectively, our references will be to the statutes then in effect, i.e., 68 O.S. 1951, §§ 351, et seq..

68 O.S. 1951, §§ 382, 383, required the County Treasurer to give prior notice of an Original Sale by publication that the sale for delinquent taxes would commence on the first Monday in November in each year, between the hours of 9 A.M. and 4 P.M., at the office of the County Treasurer. A return of the Original Sale was required to be filed with the County Clerk (register of deeds) on or before the last day of November in each year. 68 O.S. 1951, § 386.

In the instant case there were no other bidders at the November, 1953, Original Sale and the County Treasurer bid on the property and acquired for the county a tax lien. 68 O.S. 1951, §§ 388 and 391.

This property remained unredeemed after the November, 1953, Original Sale and it became the duty of the County Treasurer to conduct a Resale on this property on the second Monday in May, 1956. 68 O.S. 1951, § 432. Notice of the Resale was published for four consecutive weeks in

an authorized newspaper published in the county stating that the property (describing it and listing the name of taxable owner) would be sold at Resale at the office of the County Treasurer beginning on the second Monday in May, 1956, between the hours of 9 A.M. and 4 P.M. as required by the statutes. 68 O.S. 1951, §§ 432 b and 432 d. It was at this Resale in 1956 that Garrett and Vaughn entered their bid and acquired their Resale Tax Deed (fee simple title) within 30 days after the Resale. 68 O.S. 1951, § 432 f.

Severe penalties were provided for the County Treasurer if he failed to conduct Original Sales and Resales at the time required by statutory law. 68 O.S. 1951, §§ 432 n, 472 and 475.

It was the duty of the surface owner to attend the County Treasurer's office and pay the 1952 taxes when due on November 1, 1953. 68 O.S. 1951, § 351. If the taxes were not paid by the owner the mineral holders had the right to pay the taxes and assert an equitable lien against the surface owner, Cochran v. Godard, 182 Okl. 506, 78 P. 2d 692, since they had an interest in the land. Jenkins v. Frederick, 208 Okl. 583, 257 P. 2d 1058. As owners of an interest in the land they were required to take note of the taxing statutes and procedures affecting the control or disposition of their interest. Anderson National Bank v. Luckett, 321 U.S. 233, 243, 88 L.Ed. 692, 703. Every person who owns an interest in land in Oklahoma is charged with knowledge that the land is subject to an ad valorem tax, that the land may be sold in the manner provided by law, and is charged with notice of the time and place where such property will be sold. Ponder v. Ebey, 194 Okl. 407, 152 P. 2d 268; 68 O.S. 1951, §§ 432 b and 432d, supra. It follows that the Paschalls and Ross had knowledge that the land was taxable, when the taxes were due, when the property would be sold at Original Sale, that they had a right to redeem prior to Resale, and the time and place of the Resale. They had two years to inquire of the Treasurer whether the taxes had been paid by the surface owner prior to the Resale. Ponder v. Ebey, supra.

Since oil and gas interests in land are not separately taxed on an ad valorem basis the names of the mineral owners do not appear in the County Treasurer's records. We have held that the Treasurer is not required to search the County Clerk records to ascertain the names of the owners of the land. Herndon v. Pigg, 190 Okl. 402, 124 P.2d 425.

This court and our Legislature has been aware of *Mullane* for several years, and curative measures have been taken where necessary. Bomford v. Socony Mobil Oil Co., Okl., 440 P. 2d 713, and 66 O.S. 1971, § 55, are examples.

The distinction we draw between the cases relied upon by the Appellate Court and the statutory procedures for foreclosing tax liens is well illustrated in Walker v. Hoffman, Okl., 405 P. 2d 57. In Walker v. Hoffman we held that an applicant for a county treasurer's *certificate deed* must give notice to the severed mineral interest holders. *Mullane* clearly applies where an application is made for a treasurer's certificate deed. This is because the timing of the application is left to the applicant and the burden of providing adequate notice and due process is imposed upon the applicant. In Resales the County Treasurer gives notice by publication (to owners who already statutorily know the time and place of the sale) that the land will be sold at the time and place specified by the statute unless the taxes are paid. Thus the publication notice of Resale is supplemental to other action which had conveyed a warning to the owners of interests in the land. The Supreme Court in *Mullane* said this has been the traditional and acceptable use of publication. 339 U.S. at p. 316.

We conclude that Oklahoma's Resale tax sale procedures afford adequate notice and due process where, as here, the land was correctly described in the notices and the statutory procedures were specifically followed.

The judgment of the Appellate Court is reversed. The judgment of the trial court is affirmed.

BERRY, C.J., and WILLIAMS, IRWIN, HODGES, LAVENDER, and BARNES, JJ. CONCUR.

THIS OPINION NOT TO BE CONSIDERED AS PRECEDENT OR AUTHORITY AND NOT FOR PUBLICATION IN THE OFFICIAL REPORTER.

THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

FILED
COURT OF APPEALS
OF OKLAHOMA
DEC 6 - 1971
ANDY PAYNE
CLERK

Mary Louise Green Paschall, Individually and as Executrix of the Estate of John N. Paschall, deceased, et al.,
Plaintiffs in Error,

vs. No. 43,907

R. H. Vaughn and R. W. Garrett,
Defendants in Error.

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

Honorable Bob Howell, Trial Judge

AFFIRMED AS MODIFIED

William J. Legg
Andrews, Mosburg,
Davis, Elam, Legg
& Kornfeld
Oklahoma City, Oklahoma

Jack Highley
Highley, Highley
and Short
Oklahoma City, Oklahoma — For Plaintiffs in Error

Richard S. Roberts
Wewoka, Oklahoma
T. H. Williams, Jr.
Wewoka, Oklahoma — For Defendants in Error

BRIGHTMIRE, P. J.

The single question presented by this appeal is whether Seminole County deprived appellants of Fourteenth Amendment due process of law by failing to give them adequate notice of delinquent tax sale proceedings affecting several mineral interests they owned under a certain forty acres of land located in Seminole County, Oklahoma.

For the purpose of this opinion it is sufficient to say that appellants consist of the personal representatives of the deceased individuals who acquired 15/16th of the mineral interests to the land in question by grant in 1926, and H. Grady Ross who became owner of a 1/16th mineral interest in the same tract the same year. Both mineral deeds were duly recorded in the office of the Seminole County Clerk shortly after execution. Appellants will, for convenience be referred to as mineral owners.

The mineral owners were named defendants in a suit filed by Christie-Stewart, Inc., an oil and gas lessee of subject property, seeking a judicial determination of the rightful royalty owners as a result of oil production from subject tract. Through various motions, impleading of parties, and

pleadings, the dispute in the trial court evolved into one between appellant mineral owners and appellees, R. H. Vaughn and R. W. Garrett, who purchased the acreage during a county tax sale. For convenience the latter two appellees will sometimes be referred to as tax sale purchasers and Christie-Stewart, Inc. as lessee.

Historically, the beginning of the controversy can be traced back to 1952 when the owner of the separate surface interest failed to pay county ad valorem taxes. The County Treasurer included the land in a Wewoka (county seat of Seminole County) newspaper publication notice of an original sale to be held on the first Monday of November 1953 as required by the governing statutes, 68 O.S. 1951 § 381, et seq. Such statutes did not require other notice to be given to the mineral owners by way of personal service, mailing or posting, and, of course, no such notice was given. Seminole County became the purchaser at the original sale. Following a statutory redemption period, another Wewoka newspaper notice was published of a resale to be held on the second Monday in May 1956. It is stipulated no other notice was attempted or given the mineral owners all of whom lived in Oklahoma but in counties other than Seminole. At resale appellees Garrett and Vaughn, as successful bidders, acquired a resale deed from the county and at trial claimed by reason thereof the entire interest in the land, both surface and mineral rights.

In 1963 lessee acquired an oil and gas lease from the tax sale purchasers and later a separate lease from appellants. A producing well was drilled in 1965. Royalty payments have been suspended pending outcome of this lawsuit.

Based upon these virtually undisputed facts the trial court held that the tax sale proceedings were valid and sufficient to convey appellants' mineral rights to the tax sale purchasers and entered judgment accordingly.

Appellants defended below principally on the theory that they, as record owners of the mineral rights, were deprived of constitutionally sufficient notice of the tax delinquency proceedings and as to them such proceedings were invalid. Consequently appellants, in a cross-petition against the tax deed grantees, asked to have their title to the mineral rights quieted. The trial court declined this request and entered judgment for appellees thus holding the tax sale proceedings were constitutionally valid as to appellants.

In resolving this question we first note that Oklahoma has for many years derived a substantial portion of its income from the production of oil and gas. And the law has long recognized ownership of mineral rights under land as an estate separate from the surface rights. Ramey v. Stephney, 70 Okl. 87, 173 P. 72 (1918). Where there has been a severance of mineral rights, the owner thereof does not lose his right or estate by any length of non-use. Noble v. Kahn, 206 Okl. 13, 240 P.2d 757 (1952). "Oil and gas, while lying in the strata of earth from which they are produced, must be taxed as real property to the owner of the land, if the land is taxable, under which for the time being they may lie." In re Indian Territory Illuminating Oil Co., 43 Okl. 307, 142 P. 997 (1914). Once there is production of oil or gas, however, the mineral estate becomes severed for taxation purposes. Caney Production Co. v. Kane, Okl., 438 P.2d 938 (1967).

It cannot be doubted that state law, both statutory and decisional, is subject to compliance with the applicable provisions of the Federal Constitution as interpreted by the United States Supreme Court. The Fourteenth Amendment provides that no citizen of the United States shall by any state be deprived "of life, liberty, or property, without due process of law."

Basic to due process is a person's entitlement to notice of a proceeding affecting his rights, and a reasonable oppor-

tunity to be heard or to protect his interests. In recent years the United States Supreme Court has expanded not only the *scope* of the notice requirement, but has evolved a new approach to the constitutional sufficiency of the *means* of giving the required notice.

In regard to the scope of due process, the requirement of notice extends beyond strictly judicial proceedings. In Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948, 77 S. Ct. 324, 1 L. Ed. 2d 241 (1956), the Court vacated the judgment of the Supreme Court of Wisconsin with directions to decide the involved notice issue in accordance with the conclusion reached in Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956). The issue was whether the plaintiff's petition seeking to have a street improvement assessment voided on the ground that the city of Milwaukee had not afforded affected property owners due process of notice of the assessments merely by publishing same in a newspaper in compliance with the applicable provisions of the city charter and ordinances, was good as against a general demurrer. Upon remand the Supreme Court of Wisconsin complied and instructed the trial court:

> "In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S. Ct. 200, 1 L.Ed.2d 178. Therefore, it was error for the trial court to have sustained the general demurrer interposed to plaintiff's amended complaint." Wisconsin Electric Power Co. v. City of Milwaukee, 275 Wis. 121, 81 N.W.2d 293 (1957).

So far as due process requirements are concerned we can make no substantial distinction between the placing of an assessment lien against one's property and foreclosure of a land tax lien against the interest of one, such as an owner of mineral rights, who has no primary liability for the payment thereof. And this is without regard to the question of what notice due process requires with respect to a tax delinquent surface owner who bears the primary responsibility of paying the assessed ad valorem tax.

The next question is, then, what quality of notice did the Due Process Clause require be given appellants? We think the answer is to be found in a series of cases commencing with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), wherein the court brushed aside the elusive distinction between "in rem" and "in personam" proceedings and held publication notice due trust beneficiaries whose identities and whereabouts could with due diligence be ascertained, was constitutionally inadequate, and this is so "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." The Court recognized the "impracticality, if not the futility" of attempting direct notice to missing or unknown persons, but as to others, giving of notice only by publication is "to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

Quite prudently the Court declined to commit itself to a rigid formula for "achieving a balance between" the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." It did, however, conclude that when "notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The realistic fault found with publication notice was that "chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here [and in the case at bar], the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention."

Later in City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L. Ed. 333 (1953), the Mullane doctrine was followed with the observation that "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." Another New York statute providing only for publication and woodland postings of notice in proceedings to acquire a right to divert a stream was struck down in 1962 as constitutionally insufficient in Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255, 89 A.L.R.2d 1398 (1962).

A Kansas statute authorizing condemnation of land and proceedings to fix compensation therefor based on "notice" by publication in a local newspaper, was determined to be constitutionally insufficient regarding its notice requirements in Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 178 (1956), the Court saying: "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice." As was mentioned earlier the rationale of this holding was subsequently applied to street improvement assessment noticing in a Wisconsin case. Wisconsin Electric Power Co. v. City of Milwaukee, supra.

Clearly the United States' highest tribunal is thoroughly committed (with but slight disagreement among the justices) to the abolition of constructive notice in circumstances where some form of actual notice, such as mailing, is reasonably available. This view mirrors language in Walker v. City of Hutchinson, supra, that, "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property," and that "In too many instances notice by publication is no notice at all."

Appellees argue that to give written notice by mail to the severed mineral owners within this state, and particularly with regard to land in Seminole County would impose an almost insurmountable burden upon the county taxing authorities. While it is true that some additional effort would be required, still we do not think this alone affords a sound reason for ignoring a fundamental constitutional right. Certainly under an earlier tax statute the problem was avoided by requiring the holder of a certificate tax deed to serve notice of its issuance on all owners of interest in the land. In this connection the Supreme Court of Oklahoma recognized the need for and importance of actual notice to severed mineral owners concerning claims adversely affecting their interests in Walker v. Hoffman, Okl., 405 P.2d 57 (1965), saying:

> "Thus, if the owner of severed minerals may be deprived of his mineral estate without notice of the application for certificate deed, and without notice of an adverse claim to the minerals (occupancy of the surface not being notice of an adverse claim to the minerals, Strickland v. Reeburgh, supra [Okl., 362 P.2d 1110], it would suggest that due process, for lack of notice, has been denied. Lind v. Stubblefield, supra [138 Okl. 280, 282 P. 365]."

Regarding failure to give notice to owners of severed minerals the court in Lind emphasized: "Notice in this connec-

tion is analagous to process in the courts; and it is well known that a judgment, even so solemn a document as it is, is absolutely void unless the defendant has been served with process, with personal service, or some substituted service, provided by law. Otherwise he is deprived of his property without due process of law."

Appellees point to the contrary holding in Jenkins v. Frederick, 208 Okl. 583, 257 P.2d 1058 (1952) and Cornelius v. Jackson, 201 Okl. 667, 209 P.2d 166 (1948). These cases were decided, however, before the views of the United States Supreme Court became definitively crystallized and before Walker v. Hoffman, supra. And while the latter case is distinguishable from both Jenkins and Cornelius, the language is so strong and so compatible with the law of the land that we think they would be decided differently today.

In our opinion the conclusion is inescapable that the tax foreclosure proceedings in question were carried out without constitutional notice to appellants so that they were deprived of an opportunity to appear and protect their mineral interests. We hold, therefore, that insofar as the resale tax deed purports to transfer mineral rights to the land in question to the tax sale purchasers the same is invalid. The judgment of the trial court is accordingly modified by granting appellants judgment on their cross-petition quieting their title to the mineral rights in and under the Southwest Quarter of the Northwest Quarter of Section 29, Township 9 North, Range 7 East, Seminole County, Oklahoma, as against appellees R. W. Garrett and R. H. Vaughn.

Affirmed as modified.

Bacon, J. and Neptune, J. concur.

IN THE DISTRICT COURT OF SEMINOLE COUNTY
STATE OF OKLAHOMA

CHRISTIE-STEWART, Inc, a Corporation, Plaintiff,	)	
-vs.-	)	No. 29,092.
WALTER B. PASCHALL, Jr, And JOHN N. PASCHALL, Et Al., Defendants.	)	
R. W. GARRETT AND R. H. VAUGHN, CROSS-DEFENDANTS.	)	

JOURNAL ENTRY OF JUDGMENT.

Heretofore, on September 8, 1969, the above entitled cause came regularly on for trial before the Court: Cross-Petitioners, R. W. Garrett and R. H. Vaughn, appearing in person and by their attorney, T. H. Williams, Jr., and the substituted Defendants, Zelda Danna Paschall, as Executrix of the Estate of Walter B. Paschall, Jr., deceased and as sole devisee under the will of said deceased defendant, and Mary Louise Green Paschall, as Executrix of the Estate of John N. Paschall, deceased and Mary Louise Green Paschall, Jan Paschall Harden and John N. Paschall, Jr., as sole devisees under the will of said John N. Paschall, a deceased party defendant, and the defendant H. Grady Ross, either appearing in person and or by their Attorneys of record, William J. Legg, of Andrews, Mosburg, Davis, Elam, Legg and Kornfeld, and Jack Highley of Highley and Highley, and all of said parties announced ready for trial, upon the issues reserved in the Journal Entry of Judgment, as made and entered in this cause on June 14, 1965: whereupon the trial of said cause proceeded and all parties introduced their evidence, the Court heard the arguments of said parties, and at the conclusion thereof, granted said

parties leave to submit written briefs, and then took the case under advisement.

Now, on this 27th day of October, 1969, said cause coming regularly on for the Court's decision and judgment, pursuant to due notice to all parties of record, and said parties appearing by their Attorneys of record, the court having read and considered the evidence, the written briefs and being fully advised in the premises, FINDS, CONCLUDES AND ADJUDGES AS FOLLOWS:

(1). The resale tax deed dated May 17, 1956, for delinquent taxes for the years 1952-53-54 and 1955, as filed for record June 6, 1956 and recorded in Book 890 Page 577, records of the County Clerk of Seminole County, conveying the:

> Southwest Quarter of the Northwest Quarter of Section 29, Township 9 North, Range 7 East, Seminole County, Oklahoma,

unto the Cross-Petitioners herein, R. W. Garrett and R. H. Vaughn, as Grantees, be and the same is hereby decreed to be a valid resale tax deed, based upon full compliance with the tax sale proceedings statutes of the State of Oklahoma, and said deed hereby further decreed to have been executed, filed and recorded, and vested in said Grantees, the fee simple title in and to said lands and premises, as provided by 68 Okla. Stat. 1961, Sec. 432F.

(2). The Court Further Finds, Orders, Adjudges and Decrees that from the date of the recording of said resale tax deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in the open, continuous, visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants, are further forever barred and precluded by the statute of limitations, from seeking to assert the invalidity of said resale tax deed, as provided by 12 O.S. 1961, Sec. 93(3) and (6).

(3). It is Further Ordered, Adjudged and Decreed by the Court that mineral deeds of record, under whom the above named contesting Defendants, claim title, described as follows:

> Mineral deed, dated July 8, 1926, recorded Book 235 Page 126. August 4, 1926.
> H. Grady Ross, Grantee.
>
> Mineral deed, dated October 10, 1930, recorded Book 443 page 135, December 12, 1932.
> Walter B. Paschall, Grantee,

be and the same are each hereby cancelled and removed from the records of the Seminole County Clerk, as clouds upon the fee simple title vested in said R. W. Garrett and R. H. Vaughn, under and by virtue of said resale tax deed.

(4). It is Further Ordered, Adjudged and Decreed by the Court that the following described oil and gas leases:

> Lessor: H. Grady Ross, dated February 18, 1965, recorded February 25, 1965, Book 1064 Page 568.
> Lessee: Christie-Stewart, Inc.
>
> Lessors: Walter B. Paschall, Jr., and John N. Paschall, dated March 6, 1965, recorded March 26, 1965, Book 1066 page 193.
> Lessee: Christie-Stewart, Inc.

be and the same are each hereby cancelled and removed from the records, as clouds upon the fee simple title of said R. W. Garrett and R. H. Vaughn.

(5). It is Further Ordered, Adjudged and Decreed by the Court that the following described oil and gas lease:

> Lessors: R. W. Garrett and wife:
> R. H. Vaughn and wife,
> Dated November 6, 1963: Recorded November 13, 1963, Book 1045 Page 218,
> Lessee: Christie-Stewart Drilling Company,

be and the same is hereby established and confirmed as the valid and existing oil and gas lease on the above described property, to the exclusion of the contesting defendants and all other persons, whomsoever, and that the leasehold estate of said Lessee, and its assignees, under and by virtue of said oil and gas lease is now forever quieted and the title thereto perfected.

(6). IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the fee simple title in and to the above described land is owned by the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, in equal shares, an undivided one-half interest each, and the title and possession of said parties thereto, and in and to all of the oil, gas and other minerals lying in and under said lands is hereby perfected, quieted and confirmed as above set forth, and no other persons have any interest, lien, possession or right of possession, and said above named Defendants, as claimants, by inheritance and devise of severed oil, gas and mineral rights in and to said lands, and each of them, in their representative capacities and for themselves. their heirs and assigns, are adjudged and decreed to have no right, title or interest in and to said minerals and mineral rights, and said original Defendants and the substituted party Defendants, and each of them and all persons claiming by, through or under them, or either of them, or their predecessors in the chain of title, be and they are hereby restrained and perpetually enjoined from claiming or asserting any right, title, interest or lien in and to said oil, gas and minerals now and hereinabove forever quieted and confirmed as a perfect fee simple title in said R. W. Garrett and R. H. Vaughn, subject only to the leasehold estate of the Plaintiff herein.

To all of which said Contesting Defendants except in open court and exceptions are allowed.

DISTRICT JUDGE.

CERTIFICATE OF SERVICE

I hereby certify that the following who are all of the parties required by law to be served in the above case, were this day each mailed three copies of the foregoing Petition for Writ of Certiorari, postage prepaid:

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DATED this day of April, 1976.

William J. Legg

Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1435

ZELDA DANNA PASCHALL, LOUISE GREEN HOYT, JOHN N. PASCHALL, JR., JAN PASCHALL HARDEN and FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA,
Petitioners,

VERSUS

CHRISTIE-STEWART, INC., and
R. H. VAUGHN and R. W. GARRETT,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1435

ZELDA DANNA PASCHALL, LOUISE GREEN HOYT, JOHN N. PASCHALL, JR., JAN PASCHALL HARDEN and FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA,
Petitioners,

VERSUS

CHRISTIE-STEWART, INC., and
R. H. VAUGHN and R. W. GARRETT,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review by Writ of Certiorari of a Decision rendered by the Supreme Court of Oklahoma, pursuant to an opinion by this Honorable Court in Mary Louise Green Paschall, et al., vs. Christie-Stewart, Inc., et al., No. 72-922, which remanded the case to consider whether Petitioners had preserved the right to challenge the trial court's determination that the State's Statute of Limitations is a bar to their mineral rights claim, and, if so, whether, under State Law, the Statute of Limitations independently bars Petitioners' claim, irrespective of the constitutional adequacy of the tax-sale notice. The Oklahoma Supreme Court specifically held that Petitioners have aban-

doned their rights to attack the judgment of the trial court on the question of the Statute of Limitations, and expressed no opinion on the secondary issue.

1.

PETITIONERS HAVE FAILED TO PRESERVE THE RIGHT TO CHALLENGE THE TRIAL COURT'S DETERMINATION THAT THE STATE'S STATUTE OF LIMITATIONS IS A BAR TO PETITIONERS' MINERAL RIGHTS CLAIM.

The trial court in its judgment of October 27, 1969, specifically held:

> "(2) The Court further finds, orders, adjudges and decrees that from the date of the recording of said Resale Tax Deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in open, continuous, visible, notorious, exclusive and hostile possession of the lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants are further forever barred and precluded by the Statute of Limitations, from seeking to assert the invalidity of said Resale Tax Deed, as provided by 12 O.S. 1961, Sec. 93(3) and (6)."

Respondents admit the Petition in Error filed by Petitioners contained the two (2) averments of error set forth in their Petition for Writ of Certiorari filed herein, and that their Brief-in-Chief contained the language quoted therein. However, Petitioners' original Brief-in-Chief contained but one Proposition, *viz*: Constitutionally Adequate Notice of the original tax sale and of the Tax Resale was not given Plaintiffs in Error or their predecessors as owners of previously severed mineral rights.

The Supreme Court of Oklahoma, by unanimous decision, citing numerous authorities, has specifically found that such statements in Petitioners' Brief-in-Chief were insufficient to preserve their right to challenge the trial court's judgment as to the issue of the Statute of Limitations, since it was not supported by citation of any authorities, references to the original record or further argument of any kind.

Even now, Petitioners cite no authority in their Petition for Writ of Certiorari in support of the Proposition that the Supreme Court of Oklahoma has erred in its Application of the State Law, and in finding the Petitioners have not preserved their right.

In order to remove any doubt as to whether Respondents have properly preserved their right to assert the Statute of Limitations as a bar to Petitioners' claim, a copy of their Petition for Rehearing and brief before the Court of Appeals of the State of Oklahoma, which was incorporated in their Petition for Certiorari as to the Supreme Court of Oklahoma, and Petitioners' Response thereto, have been shown in the Appendix hereto. In addition thereto, Respondents specifically called to the Court of Appeals' attention on page 7 of their Brief-in-Chief, citing 12 Okla. Stat. 1961 § 93, that to adopt the Proposition advanced by Petitioners would be to hold invalid the applicable Statute of Limitations.

With the exception of *Walker* v. *Hoffman*, 405 P.2d 57 (Okla. 1965), which Respondents contend is clearly not applicable since it involved a Tax Deed issued without the proper statutory notice having been given, and not a Resale

Tax Deed issued in strict compliance with the Statutes, Petitioners cite authority only to the effect that failure to follow State pleading or practice should not bar this Honorable Court from assuming jurisdiction herein. It is respectfully submitted that the issue is whether Petitioners raised, at all, the question of the invalidity of the Statute of Limitations in the state court. The record is clear such was not the case, and thus it was not considered by the Oklahoma Supreme Court.

The Petitioners having failed to assert the invalidity of the Statute of Limitations on any federal ground, or to preserve such right, it is submitted this Honorable Court is now without jurisdiction to review the same. *Wilson* v. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793.

The opinion by the Court of Appeals, Division 2, of the State of Oklahoma, negates Petitioners' contention they preserved their attack on the invalidity of the Statute of Limitations in their Brief-in-Chief or otherwise. Justice Brightmire in the first paragraph of his opinion stated:

> "The *single question* presented by the Appeal is whether Seminole County deprived Appellants of Fourteenth Amendment due process of law by failing to give them adequate notice of delinquent tax sale proceedings affecting several mineral interests they owned under a certain forty acres of land in Seminole County, Oklahoma." (Emphasis supplied.)

In lieu of the single issue considered by the Court of Appeals, the Petitioners now advance four. Only two of these were presented to this Honorable Court by Petitioners' Brief of May 1973, in *Mary Louise Green Paschall,*

et al. v. *Christie-Stewart, Inc., et al.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed.2d 298.

It is further noted that Petitioners' challenge of the Statute of Limitations, if any, was not based upon any federal grounds, but solely upon the contention Respondents had not taken possession of their mineral interest and thus the Statute had not run. No contention was made that by reason of the alleged constitutional insufficiency of the Tax-sale Notice, the Statute of Limitations would not apply. It is, therefore, difficult to see how this Honorable Court can review an issue not presented for decision to the Supreme Court of the State of Oklahoma, nor passed upon by such Court.

2.

PETITIONERS, UNDER STATE LAW, ARE INDEPENDENTLY BARRED BY THE STATUTE OF LIMITATIONS.

Without apparent consideration to the adverse effect that would result to vested Resale Tax titles in Oklahoma or to the innocent purchasers of such titles, Petitioners now seek to advance the Proposition that the alleged lack of constitutionally valid notice would preclude the running of the Statute of Limitations. The adoption of such a Proposition would not only serve to overrule much of the present authority on the subject in Oklahoma, but would expose every owner of real property within the State, be it surface or mineral interest, to the potential loss of his property, if his title is based upon a Tax Sale.

Petitioners, in order to advance their theory, now attack the constitutionality of the provisions of 68 Okla. Stat.

§ 432(f), now 68 Okla. Stat. § 24335, which has provided since 1910 that the Grantee in a Resale Tax Deed shall be vested with an absolute and perfect title in fee simple to the real property covered thereby. As early as 1914, the Oklahoma Supreme Court held in *Price* v. *Salisbury*, 41 Okla. 416, 138 Pac. 1024, that a Resale Deed vests in the grantee an absolute fee-simple title.

In *Jenkins* v. *Fredericks*, 208 Okla. 583, 257 P.2d 1058, the Oklahoma Supreme Court, citing numerous previous authorities held: "That the Resale Tax Deed vests in the grantee an absolute and perfect title in fee simple to said real estate as against the owner of the mineral rights." In 1966, the Court in *Sautbine* v. *Keller*, Okla., 423 P.2d 477, affirmed the rule stating:

> "In these cases we held the Resale Tax Deed vest an absolute, fee simple title in the holder, even as against the owner of severed minerals, and possession thereunder for the prescribed period bars any claim by the prior mineral owner. Jenkins v. Frederick, 208 Okl. 583, 257 P.2d 1058.
>
> "A claim of title based upon a Resale Tax Deed is notice to the world that the owner in possession thereunder claims a new and absolute fee simple title."

The Court in the *Jenkins* case, *supra*, discussed at length the legislative intent of 12 Okla. Stat. § 93. In reversing the trial court, the Court stated:

> "Clearly the Legislature of 1949 intended that there shall be a limit of time within which deeds of the three classes mentioned in subsec. (6) can be attacked and that unless such actions were commenced within the designated period the right of each attack is lost. The Statute was designed to free one who is not in possession to begin his action for recovery of his interest in the real property or to determine an interest adverse within the specified time or lose his right to attack the deed in question. * * * When the Legislature in its 1949 Amendment lengthened the period of limitation to five years and specifically provided that the periods of limitation in paragraphs (1), (2) and (3) should be fully operative regardless of whether the deed or judgment *were based on proceedings that were void or voidable for any reason*, it is clear that it was intended to establish a uniformity of application of the prescribed Limitations in all of the three designated classes of actions." (Emphasis supplied.)

The undisputed facts of the present case show that Respondents obtained a Resale Tax Deed to the real property involved, issued in strict accordance with the Statutes then in force and effect, dated May 17, 1956, and filed for record June 6, 1956, in Book 890, page 577, of the public records of Seminole County, Oklahoma; that they thereupon took possession of the property and have remained in open, continuous, visible, notorious, exclusive and hostile possession since that time; that the Cross-Petition of the Petitioners attacking said Resale Tax Deed was not filed until March 9, 1965, some 8 years, 10 months, after the deed had been recorded.

Petitioners now argue not only a failure of Due Process, but a denial of equal protection of the law under the Constitution of the United States, an issue not heretofore raised before this Court. Most of the authorities cited by Petitioners deal with the Proposition that possession is an essential element to the running of the Statute of Limita-

tions. With this, we generally agree. What Petitioners fail to recognize is that when the Resale Tax Deed was issued pursuant to the required statutory notice, it vested Respondents with a virgin absolute fee simple title including possession of the minerals, *Jenkins* v. *Frederick, supra; Sautbine* v. *Keller, supra,* and thus commenced the running of the Statute of Limitations.

Respondents can accept and agree with the Proposition that the failure to give the required statutory notice coupled with a failure to take possession would not put in motion the Statute of Limitations. We cannot agree, however, with the Proposition that although the proper statutory required notice was given, a subsequent determination, after the Statute had run, that such notice was not constitutionally valid would preclude the running of the Statute of Limitations. To embrace this theory would be to prohibit any citizen, lawyer or Judge from relying upon any statutory required notice until the same had been declared constitutionally sound by the Supreme Court of the United States.

The Constitution of the United States, although written, is a living document. Its words are subject to judicial interpretation. Rights thereunder may be broadened or limited through changes in man's concepts of fair play and justice. Most of the currently accepted and required procedures in the areas of Civil and Criminal due process and of equal protection of the law have evolved within the past decade, having lain dormant and unrecognized until invoked by judicial Decree. To adopt Petitioners' position would be to restrict and limit the very judicial process to

which Petitioners turn for relief. Would *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and all of the subsequent cases upon which Petitioners rely have been so decided, if this Honorable Court knew its decision would result in the divestiture of all vested property rights acquired by any citizen, who in good faith, relied upon the prescribed statutory notice? We think not.

The Oklahoma Legislature, whether right or wrong, has provided by Statute that the purchaser at a tax resale shall be vested with an absolute and perfect title in fee simple (68 O.S. § 432f). Petitioners now suggest that such an act is unconstitutional and beyond the power of the Legislature. Clearly this issue, if there is one, has not been properly preserved by the Petitioners and should not be considered by the Court.

Petitioners cite, in support of the Proposition that lack of a constitutionally valid notice precludes the running of the Statute of Limitations, numerous authorities heretofore presented to this Court in its previous consideration of this case, and contend that they clearly support said position. In its opinion, remanding this cause, the Court expressly stated in footnote 4 as follows:

> "Whether the alleged lack of constitutionally valid notice would preclude the running of the Statute of Limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma Courts below. *C. F. Schroeder* v. *City of New York,* 371 U.S. 208, 213-214, 83 S.Ct. 279, 282, 283, 9 L.Ed.2d 255, 259, 260 (1962). We intimate no view on this issue."

It seems clear therefore, that the cases cited by Petitioners do not in fact support their Proposition.

The Court's attention is invited to the fact that in each of the cases cited by Petitioners, *City of New York* v. *NY, NH & HRR*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953); *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956); *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956), and *Schroeder* v. *City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 88 A.L.R.2d 1398 (1962), the rights of third parties who had relied upon the notice given in order to secure a vested interest were not apparently involved.

The *City of New York* case, *supra*, involved a creditor's claim in Bankruptcy and its lien against the real property of the bankrupt. Although it appears title to the real property might have been transferred to a newly organized company, jurisdiction to construe the decree was reserved by the court. Thus the rights of an innocent third party were not directly involved. The case turned on the fact that the statutory notice required was not given and that the substituted publication notice was not sufficient. No issue directly involving the Statute of Limitations was considered by the court.

The *Covey* case, supra, could not have arisen in Oklahoma since our Statute, 68 Okla. Stat. § 24335, expressly provides that persons under legal disability shall have one year after removal of such disability within which to redeem said real estate. Further, the defendant was the Town

of Somers, the taxing authority who had taken the property, and not an innocent third party who had purchased the property pursuant to a public sale. The precise issue of the Statute of Limitations again was not before the court. It is interesting to note that in Mr. Justice Frankfurter's portion of the opinion, while speculating on why the lower court had so held, he concluded that it might have been because of the Statute of Limitations. He then stated, "Since the State has power to put a time limit on the reopening of the judgment of foreclosure under that provision, such action is not a violation of the Fourteenth Amendment."

The *Walker* and *Wisconsin E.P. Co.* cases likewise did not involve the vested rights of innocent third parties. The parties to the suits were in both cases the municipal corporations and the owner. Title was not an issue.

Schroeder v. *City of New York, supra*, appears at first glance to be somewhat in point. A close examination of the opinion, however, reveals that the question of the Statute of Limitations was never an issue properly before the Court. The Court speaking of the apparent three-year period of limitation within which Appellant had to file their claim stated: "There was no such allegation in the pleadings, upon which the case was decided by the Trial Court." Again the rights of an innocent third party were not involved to be protected by the Court.

The trial court record of this case consists only of certain stipulations by the parties and the testimony of Mr. R. H. Vaughn. It was stipulated that the Resale Tax Deed of the Respondents was dated May 17, 1956, recorded in

Book 1045, page 218, of the public records on June 7, 1956; that at the time of the issuance of the deed, and the years for which the sale was had for delinquent taxes, there was no oil and gas production; that Respondents had paid all ad valorem taxes on the property since 1956. Mr. Vaughn testified that he and his co-tenant, Mr. Garrett had been in continuous possession of the property since June 7, 1956. Based upon this undisputed record the trial court, applying the Statutes and prevailing case law of Oklahoma, expressly and correctly found Petitioners were barred by the Statute of Limitations.

This Honorable Court has consistently held the States may constitutionally impose Statute of Limitations upon claimants in order to avoid the litigation of stale and vexatious claims. *Vance* v. *Vance,* 108 U.S. 514, 2 S.Ct. 854, 27 L.Ed. 808; *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.,* 258 U.S. 190, 42 S.Ct. 284, 66 L.Ed. 559; *Kavanaugh* v. *Noble,* 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150. The nature of the claim to be barred, irrespective of any constitutional right involved, does not appear to be the test to the validity thereof, but only whether it allows a reasonable time after its enactment for the assertion of an existing right.

3.

PETITIONERS WERE GIVEN NOTICE OF THE TAX SALE PROCEEDINGS, WHICH DEPRIVED THEM OF THEIR PROPERTY.

The issue previously briefed and argued before this Honorable Court in Case No. 72-922, was not whether notice was given, since the undisputed facts are that a publication notice was given, but whether such notice was adequate in view of the Rule announced in *Mullane* and the subsequent cases cited by Petitioners.

We invite the Court's attention to the fact that Petitioners introduced no evidence or offered any evidence in the trial court as to whether the names of Petitioners were in fact known to the County Treasurer or were very easily ascertainable from the public records then available. It is submitted that the total lack of such evidence would preclude the Court from now seeking to apply the principles of *Mullane.*

4.

THE STATE COURT HAS NOT DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT NOR HAS IT DECIDED SUCH QUESTIONS IN A WAY NOT IN ACCORD WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

The opinion of the Oklahoma Supreme Court of November 5, 1974, which Petitioners seek to have reviewed, clearly decided no Federal Questions of substance. The essence of such opinion was to find that Petitioners had failed to preserve their right to challenge the trial court's holding that their claim was barred by the Statute of Limitations.

The Court made specific reference to the trial court's determination that (1) under 12 O.S. 1961 § 93 (3) and (6) that the five-year Statute of Limitations had run against Petitioners and (2) that the Resale Tax Deed was validly issued under 68 O.S. 1961 § 432 and existing Tax Sale procedures; the Court then reversed the judgment of the Court of Appeals, and affirmed the judgment of the trial court for the reasons hereinabove stated. It would, therefore, appear the decision did not involve any Federal Question of substance, nor was it decided in a way not in accord with other applicable decisions of this Honorable Court.

The holding by the Supreme Court of the State of Oklahoma concerned matters of State Law and amounted at most to an alleged erroneous construction of the application of the State Statute of Limitations to Petitioners' claim, which this Honorable Court is without jurisdiction to review. *Neblett* v. *Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOE S. ROLSTON III, of
ELLIOTT, WOODARD, ROLSTON & KELLEY
Suite 300, Local Federal Building
Oklahoma City, Oklahoma 73102

Counsel for Respondents

May, 1976

APPENDIX

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
DEC 16 1971
ANDY PAYNE
CLERK

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

PETITION FOR REHEARING

Come now, R. H. Vaughn and R. W. Garrett, Defendants in Error, and respectfully represent to the Court that on the 6th day of December, 1971, a Decree and Judgment was rendered by this Court in said cause modifying the judgment of the Trial Court and affirming said judgment as modified.

1. That said decision is in conflict with the Rules on Practice and Procedure in the Court of Appeals, Rule 3.2, and the Objectives of the Supreme Court of the State of Oklahoma, to which the attention of the Court has not been called in this case, either in Brief or oral argument, or which has been overlooked by the Court, to-wit:

(a) That said decision was rendered while a Motion for Recall and Retention of Case in Supreme Court was pending and not disposed of by the Supreme Court.

(b) That said decision results in declaring unconstitutional certain Oklahoma Statutes dealing with

Notice in the Tax Sale of Real Property, but cannot be considered as precedent or authority to be followed by the lower Courts of the State of Oklahoma.

(c) That said decision results in the overruling of controlling precedent in the State of Oklahoma.

(d) That said decision presented a question of constitutional or public law and should not, therefore, have been determined by the Court of Appeals.

2. That said decision overlooked questions decisive of the case, and duly submitted by Counsel, to-wit:

(a) That the Court failed to apply the provisions of Title 12, Oklahoma Statutes Section 93(3), which prohibits the bringing of an action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the Tax Deed.

(b) That the Court failed to apply the provisions of Title 68, Oklahoma Statutes Section 24344, which requires that a tender of all taxes, penalties, interest and costs must be made by a party seeking to redeem and set aside a Tax Deed.

(c) That the Court failed to apply the principal followed by the Supreme Court in *Bomford vs. Socony Mobil Oil Company*, 440 P2d 713 (1969) which will result in the upsetting of settled titles within the State of Oklahoma.

WHEREFORE, Defendants in error pray that a rehearing of said cause may be granted by your Honorable Court.

ELLIOTT, WOODARD & ROLSTON
BY .....
JOE S. ROLSTON III
SUITE 300 LOCAL FEDERAL BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
ATTORNEYS FOR DEFENDANTS IN ERROR

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

BRIEF IN SUPPORT OF PETITION FOR REHEARING

1. The above cause was apparently assigned to the Court of Appeals Division No. 2, by Order of the Chief Judge of the Supreme Court on November 12, 1971. On November 18, 1971, a Motion for Recall and Retention of Case in the Supreme Court was filed by the Plaintiffs in Error herein, which motion was pending and undisposed of at the time the decision was rendered by this Honorable Court. It is respectfully submitted that until said Motion was disposed of by the Supreme Court, no decision should have been rendered in the above cause and that said opinion should be withdrawn until such time as the jurisdiction of this Court to hear the same has been determined.

Rule 3.2 (a) of the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court as promulgated by the Supreme Court states:

"(a) The objective of this Court is to assign to the Court of Appeals primarily those cases which *do not*:

(1) present a matter of first impression;

(2) seek the overruling of controlling precedent; or

(3) present a question of constitutional or public law.

(Emphasis Supplied "

Clearly the decision of this Court is manifestly contrary to the express objectives of the Supreme Court as set forth in (2) and (3) of the above Rule. The decision unquestionably overrules precedent, *Jenkins* v. *Frederick*, 208 Okl. 583, 257 P2d 1058 (1952) and *Cornelius* v. *Jackson*, 201 Okl. 667, 209 P2d 166 (1948) and declares unconstitutional the notice now required by the pertinent Oklahoma Statutes.

Since the decision of this Court is not to be considered as precedent or authority and is not for publication in the official Reporter, such decision may result in a different standard of justice being applied to these Defendants in Error, than will be applied to others under similar circumstances. In order to avoid the application of this double standard of justice, it is respectfully submitted that said decision should be withdrawn and the matter thereafter be assigned to the Supreme Court on request of a majority of the Judges of this division pursuant to Rule 3.2(b) of the Rules on Practice and Procedure in the Court of Appeals.

2. It would appear from the stipulated facts and the record, the Resale Tax Deed in question was issued and recorded in 1956. The present action was not commenced until 1963, more than six (6) years after the deed was recorded.

Title 12, Section 93 (3) of the Oklahoma Statutes provides that actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods therein prescribed. Sub-section 3 provided that an action for the recovery of real property sold for taxes, must be brought within five (5) years after the date of the recording of the Tax Deed.

The Resale Tax Deed of the Defendants in Error was not void on its face nor was the County without jurisdiction to sell the property. Further, the record reflects that the Defendants in Error were in continuous possession of the real estate since the Deed was issued. Under these circumstances, the Court should have denied recovery based upon the Statute of Limitations. See *Gooding* v. *Edwards*, Okl. 290 P2d 408 (1955) and *Boone* v. *Clayton*, Okl. 269 P2d 980 (1954).

The record further reflects that the Plaintiffs in Error at no time made any tender of the taxes, penalties, interest and costs which had been paid by the Defendants in Error, as required by the provisions of Title 68 Section 24344 of the Oklahoma Statutes. The Plaintiffs in Error were not entitled to present and have determination of their attack on the Resale Deed either in the Trial Court or on appeal by this Court in the absence of such tender. *Knisely* vs. *Board of Trustees of the Town of Skiatook*, 192 Okl. 225, 134 P2d 971 (1943).

The Plaintiffs in Error cite and rely upon in their Reply Brief filed herein, *Bomford* v. *Socony Mobil Oil Company*, Okl. 440 P2d 713 (1960). It would appear, however, that this Court has failed to apply to its decision the fundamental principal set forth by the Supreme Court therein. The Supreme Court in its final paragraph citing authorities, stated:

> "Mindful of our duty to guard against any attempt to upset settled titles by imposition of new requirements which did not exist before, we declare that all procedural modifications enunciated herein shall not be construed as invalidating the publication process in this case or in any case in which the Trial Court's judgment shall have been rendered before this opinion becomes final."

The decision of this Court clearly does not follow or apply the above principal and will, if allowed to stand,

upset all titles which were secured by Resale Tax Deed issued following the prescribed statutory procedure.

It is, therefore, respectfully submitted that Defendants in Error Petition for Rehearing should be granted and the decision of the Court rendered on December 6, 1971, should be withdrawn and the cause assigned to the Supreme Court for decision or upon further consideration, the decision of the Trial Court should be affirmed.

ELLIOTT, WOODARD & ROLSTON

BY

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ATTORNEY FOR DEFENDANTS IN ERROR

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OKLAHOMA CITY, OKLAHOMA

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

RESPONSE TO PETITION FOR REHEARING

Come now, Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, deceased, and Jan Paschal Harden, John N. Paschall, Jr., and

H. Grady Ross, and Zelda Danna Paschall, individually and as Executrix of the Estate of Walter B. Paschall, Jr., deceased, Plaintiffs in Error, in response to the Petition for Rehearing filed herein by Defendants in Error, and respectfully show the Court that the matters set forth in such Petition for Rehearing are either moot, or were given adequate consideration and argument in prior pleadings and briefs, or are without legal merit. In support thereof the attached brief is tendered for the consideration of the Court.

Accordingly, Plaintiffs in Error pray that the rehearing requested by Defendants in Error be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 1972, he caused a copy of the foregoing Response to Petition for Rehearing and supporting Brief to be mailed, postage prepaid, to Elliott, Woodard & Rolston, Attention: Joe S. Rolston III, Suite 300, Local Federal Building, Oklahoma City, Oklahoma 73102.

s/ William J. Legg
William J. Legg

IN THE COURT OF APPEALS OF
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BRIEF IN SUPPORT OF RESPONSE TO
PETITION FOR REHEARING

Recognizing that Plaintiffs in Error had on file in the Supreme Court of Oklahoma at the time of the decision of this case by this Court, their Motion for Recall and Retention of Case in the Supreme Court, it should be noted that Defendants in Error made no effort to support such Motion prior to the decision. Regardless of that however, the Supreme Court on December 20, 1971, issued its Order denying the Motion for Recall and Retention, reciting that the Motion was untimely filed and moot. It is submitted therefore that it is untimely now for the Defendants in Error to suggest that the opinion of this Court be withdrawn, since the Motion in the Supreme Court had been denied. The point is moot.

Defendants in Error have additionally raised three other arguments for setting aside this Court's opinion of December 6, 1971, each of which were touched upon in prior pleadings but not pursued seriously before:

1. Defendants in Error have suggested that the defense of their property rights by Plaintiffs in Error was barred by Title 12, Section 93(3). This argument is based upon a

literal reading of the section which requires the recordation of the tax deed for a period in excess of five (5) years. However, the Supreme Court of Oklahoma has repeatedly held that implied therein is a further requirement that actual possession be taken and held adversely in the legal sense during that same five (5) year period, constructive possession not being sufficient; *Sarkeys* vs. *Scott*, 269 P.2d 779. In *Myers* vs. *Parkins*, 412 P.2d 136, it was held that:

> "Where ownership of the surface and of the mineral rights have been severed, the only way the Statute of Limitations can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening and operating mines for the statutory period."

The transcript of the trial proceedings clearly establishes that no operations for drilling or producing minerals occurred during the period after the recordation of the tax deed and before the granting of the oil and gas lease to Christie-Stewart, Inc., who also took a similar oil and gas lease from Plaintiffs in Error at approximately the same time. No other oil and gas leases were ever granted by Defendants in Error, according to testimony. Under the authority cited above, it can only be held that Defendants in Error wholly failed to take possession of the minerals under the land here being considered and therefore cannot rely upon 12 O.S. §93(3) as perfecting their rights to the minerals by prescription. *Gooding* vs. *Edwards*, 290 P.2d 408, which was based upon and cites *Boone* vs. *Claxton*, 269 P.2d 980, both of which cases are cited by Defendants in Error, was specifically overruled on this exact point in *Walker* vs. *Hoffman*, 405 P.2d 57 (pg. 60).

2. Defendants in Error have raised the technical point that Plaintiffs in Error "at no time made any tender of the taxes, penalties, interest and costs which had been paid by the Defendants in Error, as required by the provisions

of Title 68 Section 24344 of the Oklahoma Statutes." First, it will be observed that Defendants in Error purchased this tax title to forty acres of Seminole County land and after this present decision they still own forty acres of Seminole County land. This Court's decision merely means that they did not, thereby, obtain title to the minerals under the land and consequently they have lost nothing by the non-tender. Second, under the law of Oklahoma, the surface owner has the full duty of paying ad valorem tax, not the mineral owner; *Myers* vs. *Parkins*, 412 P.2d 136. Since Plaintiffs in Error are severed mineral interest owners, there was no amount of taxes due from them, either before or after the tax sale. Consequently, the statute cited by Defendants in Error, §24344, to require a tender, is inapplicable because its language is as follows:

> "To defeat the deed, the person desiring to set the same aside and recover the land . . . must, when his action to set aside the tax deed is brought, or a defense to a recovery of possession is pleaded, tender in open court for the use of the holder of the tax deed, all taxes, penalties, interests and costs, *which the party seeking to redeem would be bound to pay* if he was then redeeming the land from tax sale. . . ." (emphasis supplied)

Of course, Plaintiffs in Error are not seeking to "redeem" in the technical sense, but are seeking merely to protect their property rights from a claim asserted by reason of a tax deed. Even if they were considered as attempting to redeem, this statute requires them to tender only that which they would be bound to pay otherwise. Since mineral owners are not bound to pay taxes, and since these mineral owners are not redeeming, the tender requirement is not applicable. If required, Plaintiffs in Error have no objection to paying such taxes, penalties, interest and costs, to the extent of any redemption which they are found to have made, and they hereby make such tender; however, they

ask that the Court determine the amount thereof, keeping in mind that these are mineral owners without duty to pay ad valorem taxes, that they will only be redeeming such mineral rights (not the surface estate), and that Defendants in Error will still retain the full fee simple title to the land less and except only the oil and gas and other minerals thereunder. The impracticality of exactly determining the amount, we believe, illustrates the impracticality of requiring such a tender in these circumstances.

3. Defendants in Error have complained that the decision of this case by this Court does not apply the principle followed in the case of *Bomford* vs. *Socony Mobil Oil Company*, 440 P.2d 713, concerning the upsetting of settled titles within the State of Oklahoma. The quotation in their Brief deals with the imposition of new requirements for showing compliance with procedural due process. The Bomford opinion had affirmed the lower court that due process by publication service in that case had fulfilled all requirements. The Supreme Court went further, however, and in effect laid down procedural requirements for future cases, but stated in the quoted paragraph that these new procedural rules would not apply to prior adjudications. This was not saying that the constitutional requirements of due process in any case would not be fully enforced even if purported titles and claims would be upset. The Constitution is the law of the land regardless of the fact that certain claims may be upset by its enforcement. The Bomford opinion specifically recognizes the U.S. Supreme Court decisions commencing with *Mullane* vs. *Central Hanover B. & T. Co.*, supra, stating "Oklahoma has long recognized the Mullane doctrine." In the instant case, this Court has simply enforced the Constitution, and it should not limit the effect of its ruling on the possibility that some claimants to other people's property might be upset. The Bomford case protected *judgments* of courts rendered before that opinion became final: the opinion in the instant case affects

tax sales and will have no upsetting effect on titles perfected by judgments. The fact that Resale Tax Deeds may have been issued following the prescribed statutory procedure should have no validating influence on them if that statutory procedure violates the Constitution. If that argument were sound, State legislatures could enact any law they desired, even though unconstitutional, and there would be no constitutional protection available, because striking down the unconstitutional law would upset interests which might be claimed thereunder. What happens to the Constitution then? Where is constitutional protection in such circumstances?

* * * * * *

We have attempted to answer each of the points raised in the Petition for Rehearing, in the belief that this case is important and should have full consideration of the various issues involved. However, we suggest that the overriding issue is the Constitutional question represented by the Mullane decision of the U.S. Supreme Court. That was the question on which the case was submitted and with which the appellate briefs dealt almost exclusively. At this late stage, new attorneys have entered the case bringing up subsidiary questions not previously pursued seriously. We urge the Court to stand upon its well-written, well-reasoned opinion dealing with the central issue of this case, and not permit these minor and belated matters to obscure the true significance of the Court's holding.

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CERTIFICATE OF SERVICE

I hereby certify that the following, who are all of the parties required by law to be served in the above case, were this day each mailed three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari, postage prepaid:

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DATED this ... day of May, 1976.

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